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37. See briefs in 2535
No. 2539

United States
Circuit Court of Appeals

For the Ninth Circuit.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

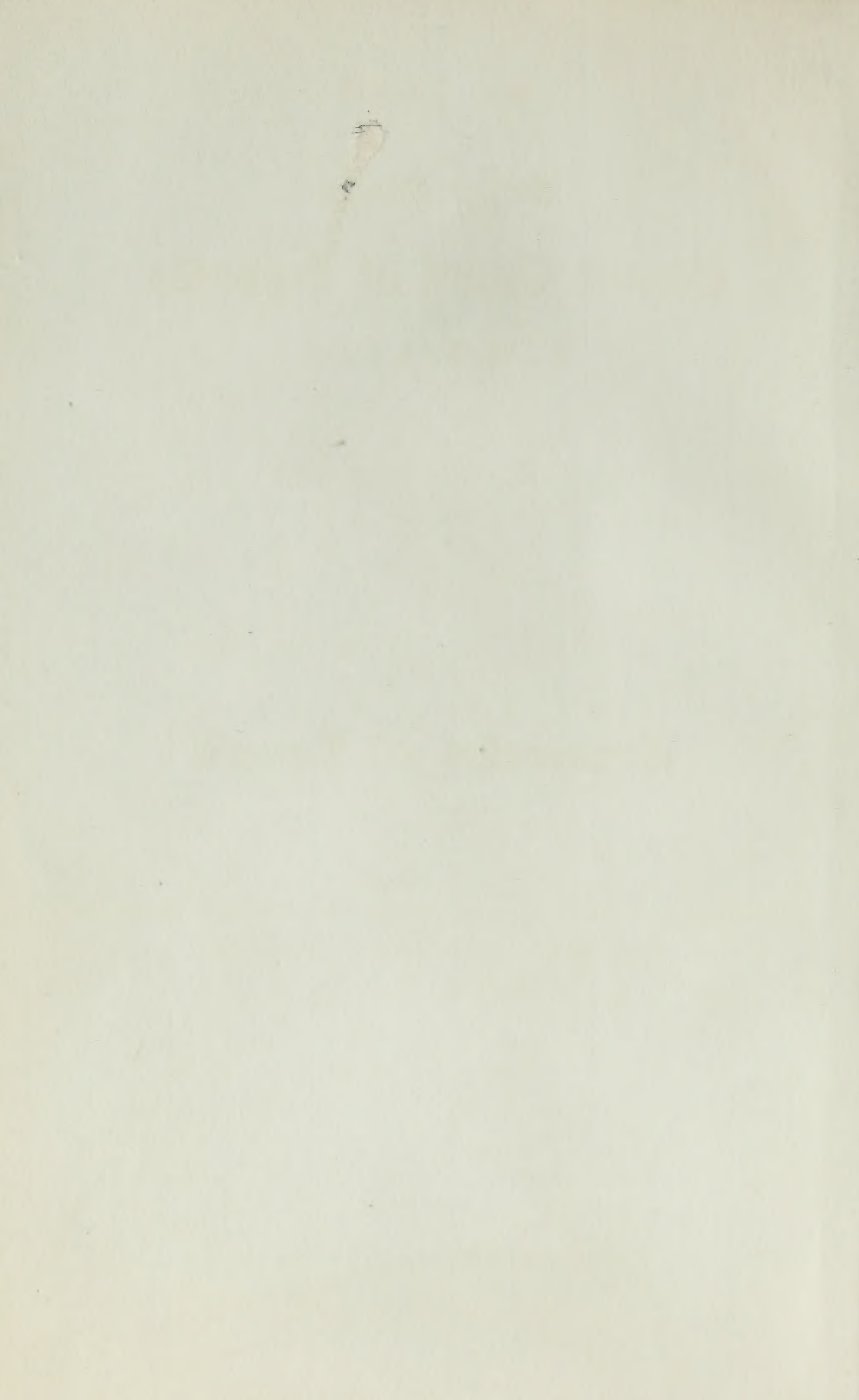
Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

JAN 25 1915

F. D. Monckton,
Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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Pacific Building, San Francisco, California;
and

R. P. HENSHALL, Esq., Los Angeles California. [3*]

Citation on Appeal (Original).]

United States of America,—ss.

The President of the United States, to E. Thompson
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern District of California, Southern Division, wherein Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson are appellants, and you are appellee,

*Page-number appearing at foot of page of original certified Record.

to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable BENJAMIN F. BLEDSOE, United States District Judge for the Southern District of California this 26 day of December, A. D. 1914.

BENJAMIN F. BLEDSOE,
United States District Judge. [4]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and
JOSEPH K. HUTCHINSON,

Defendants. [5]

*In the District Court of the United States, Southern
District of California, Southern Division.*

Bill in Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and
JOSEPH K. HUTCHINSON,

Defendants.

Now comes the above-named complainant and for cause of action against defendants above-named complains and alleges:

That complainant is now, and at all times hereinafter stated, was a citizen of the United States and of the State of New Jersey, and a resident of the State of *New Jersey*; that the defendants Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, and each of them, now are, and at all times hereinafter mentioned were citizens of the United States and of the State of California, and residents of the State of California; that the amount in controversy between the plaintiff and defendants herein in this action exceeds, exclusive of costs and interest, the sum of Three Thousand Dollars (\$3,000.00); that the real estate and placer mining claims affected by this suit are situate in San Bernardino County, State of California, that neither the said complainant nor the said defendants, or either of them, are now, nor for a long time prior to the commencement of this suit, have they or either of them been in the actual possession of the said placer mining claims, hereinafter particularly described.

I.

That during the year 1910, plaintiff jointly with one H. C. Fursman, W. Huff, H. A. Baker, R. Waymire, P. Perkins, D. Smith and defendant, Thos. W. Pack, duly located and recorded twelve certain [6] placer mining claims, hereinafter more particularly described, situate in and upon Searles Borax Lake, County of San Bernardino, State of California; that plaintiff is now, and ever since the date of said loca-

tions, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims and each of them; that the said twelve placer mining claims above referred to are more particularly described, named and numbered as follows, and are more fully described in said notices of locations, copies whereof are recorded in the office of the County Recorder of San Bernardino County, State of California, in Volume 82 of Mining Records, at the pages of said volume hereinafter designated following the respective names of said placer mining claims, to wit:

"The Soda No. 68 Placer Mining Claim," at page 164 thereof;
"The Soda No. 69 Placer Mining Claim," at page 165 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 71 Placer Mining Claim," at page 166 thereof;
"The Soda No. 72 Placer Mining Claim," at page 166 thereof;
"The Soda No. 87 Placer Mining Claim," at page 174 thereof;
"The Soda No. 88 Placer Mining Claim," at page 174 thereof;
"The Soda No. 89 Placer Mining Claim," at page 175 thereof;
"The Soda No. 90 Placer Mining Claim," at page 175 thereof;
"The Soda No. 91 Placer Mining Claim," at page 176 thereof;
"The Soda No. 111 Placer Mining Claim," at page 186 thereof;
"The Soda No. 112 Placer Mining Claim," at page 186 thereof;

II.

That during the month of September, 1914, the above-named defendants caused to be served upon plaintiff, a paper which purports to be a notice of forfeiture, a copy of which said so-called "Notice of Forfeiture" is hereto attached, marked Exhibit "A" and made a part hereof. That in and by said pretended Notice of Forfeiture it appears that all of plaintiff's right, claim, title [7] and interest in

and to the said twelve above described placer mining claims, and each thereof, will be forfeited and a cloud cast upon plaintiff's title thereto within ninety days from the date of service of said so-called Notice of Forfeiture upon this plaintiff, unless plaintiff, within said ninety days, pays to defendants or to defendant, Joseph K. Hutchinson, for said defendants, the sum of \$150.00, claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack upon said claims in the year 1911 as recited in said pretended Notice of Forfeiture. (Exhibit "A.")

III.

Plaintiff alleges that the said defendant, Thos. W. Pack, did not expend, or cause to be expended, during the year 1911, or during any other year, or at any other time, or at all, the sum of \$1,200.00, or any part or portion thereof, or any other sum or sums or any sum at all of his own money or funds upon said twelve above described placer mining claims, or upon any of them, or upon any placer mining claim or claims located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest, in the County of San Bernardino, State of California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all. Plaintiff further alleges that the said Thos. W. Pack did not expend or cause to be expended, during the year 1911, or during any other year, or at any other time, or at all, the sum of \$100.00 or any part or portion thereof of his own money

or funds, or any other sum or sums, or any sum at all, upon each, or upon any or all of said above described twelve placer mining claims, or upon any placer mining claim or claims, located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest in the County of San Bernardino, State of [8] California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all.

IV.

That said pretended Notice of Forfeiture does not, in any way, describe the kind, character or nature of the pretended labor and improvements, or labor or improvements, claimed to have been done and performed upon said claims, or any of them, during the year 1911, by the said Thos. W. Pack.

That plaintiff is unable to ascertain from said pretended Notice of Forfeiture whether the said defendant Pack claims to have actually expended, of his own money or funds, in labor and improvements, or in labor or improvements, upon each of said placer mining claims, the said sum of \$100.00, or the sum of \$1,200.00 upon all of them, or any other sum or amount, or Whether the said defendant Pack claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon each and all of said placer mining claims the annual representation work for the year 1911; that plaintiff cannot ascertain from the said pretended Notice of Forfeiture whether the amounts claimed to have been expended

by said defendant Pack of his own money or funds upon said placer mining claims, or upon any of them, if he ever expended any money at all thereon, was the value of \$100.00 for each claim, or of the value of \$1,200.00 for all, or whether such labor and improvements, or labor or improvements increased the value of each of said claims in the sum of \$100.00, or the value of them all in the sum of \$1,200.00, or whether said pretended labor and improvements, or labor or improvements, tended in any way to develop any or all of said placer mining claims, or increased or aided in availability for taking ores or minerals from said claims, or from any of them; that this plaintiff further alleges upon [9] information and belief that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims, or any of them, for the year 1911, expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said placer mining claims are located, as aforesaid, and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said Searles Borax Lake for the purpose of performing said representation work during said year upon said claims.

That said pretended Notice is executed, made and signed by defendants Thos. W. Pack, S. Schuler and Joseph K. Hutchinson; that the same discloses upon its face that neither the said Schuler or the said Hutchinson, or either, or both of them, had any in-

terest or ownership in or to the said placer mining claims mentioned therein, or in or to any part or portion of them, during the year 1911, or during the time it is claimed Thos. W. Pack expended money for labor and improvements thereon, and that neither the said S. Schuler, or the said Joseph K. Hutchinson ever expended, or caused to be expended the money named in said pretended Notice of Forfeiture, or any money thereon.

V.

That on or about the 25th day of December, 1913, defendant S. Schuler made, executed, acknowledged and delivered her deed and conveyance to one J. A. Shellito, whereby she transferred and conveyed to said J. A. Shellito all of her right, title and interest in and to said above described placer mining claims, together with her right, title and interest in and to certain other placer mining claims therein described; that thereafter and on or about the 14th day of January, 1914, the said defendant Schuler assumed to convey to defendant Hutchinson the same interest and property [10] that she, the said defendant Schuler, had theretofore conveyed to the said J. A. Shellito, as hereinabove alleged; that the said defendant Hutchinson, at the time of receiving said conveyance was fully informed and had full knowledge that the said defendant Schuler had conveyed all the rights, interest, claims and property therein described to the said J. A. Shellito, a long time prior to the execution of said conveyance by said Schuler to said Hutchinson; that plaintiff further alleges that the said Hutchinson took said conveyance from

the said defendant Schuler for the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or for all or a part of them, and not for his own use and benefit, and in pursuance of a combination and conspiracy by and between these defendants in this suit and the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, wherein and whereby the said defendants, and the said above named corporations confederated and combined together to injure plaintiff and to deprive and defraud him of all his right, title and interest in and to said above described placer mining claims.

VI.

Plaintiff further alleges upon his information and belief that the pretended transfer of the said one-eight interest of the said Thos. W. Pack in and to these said above described claims by the said S. Schuler to the said Joseph K. Hutchinson, if such transfer was made at all, as set forth in said pretended Notice of Forfeiture, was made and done pursuant to and in order to carry out a combination and conspiracy to injure plaintiff and to deprive and defraud him of all of his right, title and interest in and to said placer mining claims and each and all of them; that the said pretended transfer to the said Joseph K. Hutchinson by the said S. Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration; [11] that if any consideration at all was paid by

the said Joseph K. Hutchinson to the said S. Schuler for the said transfer, the same was advanced and paid by the Foreign Mines and Development Company, a corporation, or by the American Trona Company, a corporation, or by the California Trona Company, a corporation, or by part or all of them, or by some person or persons authorized by them, or part or all of them, or acting for them, or for part or all of them, and on their behalf, or on the behalf, of part or all of them; that the said Joseph K. Hutchinson took the title to the said one-eighth interest in and to these said above described claims, if he took the title at all, for the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them, and not for his own use and benefit; that the said Joseph K. Hutchinson now claims to hold the said title to the said one-eighth interest in and to the said above described claims, if such title ever passed to him, for the sole and only use and benefit of the said Foreign Mines and Development Company, the said American Trona Company, the said California Trona Company, or for the sole use and benefit of part or all of them, and not for his own use and benefit.

Plaintiff further alleges that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company claim rights and interest in and to the mineral lands covered by said placer locations so made and recorded by plaintiff and others, as hereinabove alleged, and that said Foreign Mines and Development Company,

the American Trona Company and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by plaintiff and others, as hereinabove alleged, and that the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have, and each and every of [12] them has, as plaintiff is informed and believes, fraudulently attempted to procure the right, title and interest of defendant, Pack, in and to said locations so made by plaintiff and others as hereinabove alleged, for the express purpose, and none other, of using the said interest of the said Pack in and to said locations, in such a way and manner as to destroy all of plaintiff's rights and interest therein, and to defraud this plaintiff out of all interest in and to said claims, and each of them; this plaintiff further alleges on like information and belief that the defendant, Joseph K. Hutchinson, has been acting as the agent, representative and attorney of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, in endeavoring to deprive and defraud plaintiff of his rights and title in and to said placer mining locations, as above alleged; that the said defendant, Joseph K. Hutchinson, under the direction and orders of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, fraudulently obtained said transfer of the said one-eighth interest in and to said placer mining claims, if he obtained said transfer at all, from defendant

Schuler, in pursuance to the combination and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, and the said defendants herein, and each of them, to injure plaintiff and defraud and deprive him of all of his right, title and interest in and to said claims, and each of them; that in further pursuance of said combination and conspiracy, and under the orders and direction of the said Foreign Mines and Development [13] Company, the American Trona Company and the California Trona Company, or all or part of them, said defendant Joseph K. Hutchinson, and the said defendants Schuler and Pack, caused to be served upon plaintiff the pretended Notice of Forfeiture above described (Exhibit "A"); that the fraudulent transfer of the said one-eighth interest in and to said claims by the said defendant Schuler to the said defendant Hutchinson, if any transfer was made at all, and the serving of the said pretended Notice of Forfeiture upon the said plaintiff as aforesaid, was all done in pursuance to and in the carrying out of a combination and conspiracy entered into by and between the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, and the said defendants, and each of them, confederated together for the purpose of injuring plaintiff and depriving and defrauding him of all his right, title and interest in and to said placer mining claims above described.

VII.

Plaintiff further alleges upon his information and belief that the said pretended Notice of Forfeiture was prepared and served upon him pursuant to and in the furtherance of such combination and conspiracy between the defendants herein and the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and that the said Thos. W. Pack never, during the year 1911, or at any other time, expended, or caused to be expended, the sum of \$1,200.00 of his own funds or money, or any other sum or amount in and upon said claims, or upon one, or any of them, for any purpose whatsoever, and that neither he nor any of the defendants herein, or their co-conspirators are entitled to any contribution from plaintiff in any sum or amount whatsoever.

VIII.

That plaintiff is informed and believes that none of the money [14] defendant Pack claims to have expended as and for representation work, or for labor and improvements, or labor or improvements on the above described claims, or any thereof, if expended by the said Pack at all, was expended by him for the actual representation and assessment work upon the said claims, or any of them, as required by law; but plaintiff alleges that defendant Pack paid the moneys set forth in the said pretended Forfeiture Notice, if he paid any money at all, for certain goods, wares and merchandise, furnished to certain laborers, employed by plaintiff and his co-locators doing assessment work on said claims in the years 1911 and 1912, and

for automobile hire in transporting said laborers and supplies to and from said placer mining claims.

IX.

That on the 14th day of January, 1913, one W. W. Colquhoun, through his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit against defendant Pack, one Henry E. Lee and one T. O. Toland, in the Superior Court of the State of California, in and for the City and County of San Francisco, which said suit is entitled "W. W. Colquhoun, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, a Copartnership, and Thos. W. Pack, Henry E. Lee and T. O. Toland, as Individuals, Defendants, and numbered 46,604 in the records of the Superior Court of the City and County of San Francisco, State of California; that in the verified complaint in said suit plaintiff, W. W. Colquhoun, alleges that he is the assignor of C. J. and E. E. Teagle, and that the sum of \$750.00 is due him for certain goods, wares and merchandise sold and delivered to the said Pack and the other two defendants named in said suit, during the years 1911 and 1912, and that the same had never been paid. This plaintiff alleges upon information and belief that the said goods sued for in said action were purchased by said Pack from C. J. and E. E. Teagle in the town of Johannesburg, Kern County, California; that the whole amount of [15] said goods, wares and merchandise so purchased by the said Pack from the said Teagles was the sum of \$969.00 and that the said Teagles admit that the sum of \$219.00 has been paid upon said account; that this

plaintiff further alleges upon his information and belief that the said sum of \$750.00, sued for in said action, constitutes part of the amount which the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff and threatening a forfeiture of his rights and interests in and to said above described placer mining claims; upon his failure so to contribute, as recited in their said pretended Notice of Forfeiture; that on the 4th day of February, 1914, a judgment was rendered in said suit against the said Pack, in favor of plaintiff, in the whole amount sued for, which said judgment is now standing of record and docketed in Volume No. 29 of Judgments at page 484 of the records of the County Clerk of the City and County of San Francisco, State of California, and has never been satisfied or discharged, either in whole or in part, or set aside, vacated or modified.

X.

That on the 20th day of January, 1913, one M. A. Varney, by his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit in the Superior Court of the City and County of San Francisco, State of California, against defendant Thos. W. Pack, one Henry E. Lee and one T. O. Toland, which said suit was entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. Thos. W. Pack, Henry E.

Lee and T. O. Toland, as individuals, and Thos. W. Pack, Henry E. Lee and T. O. Toland, a Copartnership, Defendants," and numbered 46,692 in the records of the said Superior Court; that in the verified complaint in said suit the plaintiff [16] therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and rendered services to defendant Thos. W. Pack and the other defendants therein, in the sum of \$4,180.00, of which said sum \$535.00 had been paid; that thereafter and on or about the 4th day of February, 1913, a judgment was entered in said action against the said Thos. W. Pack, in favor of plaintiff, in the whole amount sued for. That plaintiff is informed and believes and therefore alleges the fact to be that said judgment in said suit is still standing of record and has never been satisfied, set aside, vacated or modified. That plaintiff is informed and believes and therefore alleges the fact to be that the last above named action was brought by the said M. A. Varney to recover the sum of \$4,180.00 from the said Thos. W. Pack, Henry E. Lee and T. O. Toland, for the use of two certain automobiles and certain supplies furnished by the said M. A. Varney to the said Thos. W. Pack, at his special instance and request, in the years 1911 and 1912, and used by the said Thos. W. Pack to transport men hired by plaintiff and his co-locators to do the annual assessment work on said above described placer claims for said years, and supplies for said men, from the City of Los Angeles and elsewhere to the above described placer claims on Searles Borax Lake, San Bernardino

County, California; that plaintiff alleges upon his information and belief that the said sum of \$4,180.00 sued for in said action, constitutes part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff, and threatening a forfeiture of his rights and interests to and to said above described placer claims upon his failure so to contribute, as recited in their said pretended [17] Notice of Forfeiture. (Exhibit "A.")

XI.

That on the 2d day of September, 1913, one W. W. Colquhoun, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack, filed a suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against this plaintiff and H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith and S. Schuler, to recover the sum of \$750.00 alleged to be due said plaintiff for the value of certain goods, wares and merchandise, which said suit is entitled in said Superior Court, "W. W. Colquhoun, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a Copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler,

as Individuals, Defendants," and numbered 50,723 in the files and records of the said Superior Court; that in his verified complaint in said suit the said W. W. Colquhoun alleges that C. J. and E. E. Teagle assigned to him the said claims sued upon in said action; he further alleges that during the years 1911 and 1912 the said C. J. and E. E. Teagle furnished certain goods, wares and merchandise of the value of \$750.00 to defendants therein, including this plaintiff, and that no part of said sum had been paid; that plaintiff herein alleges the fact to be that said suit was brought by plaintiff for the value of the said goods, wares and merchandise claimed to have been sold and delivered by plaintiff's assignors to Thos. W. Pack in the years 1911 and 1912, and it is claimed that the same were used by a camp of men doing assessment work upon the claims hereinabove described, together with other placer mining claims, during the years 1911 and 1912; that the whole amount of the value of said goods, so alleged to have been sold was \$969.00, but that the said plaintiff in said suit admitted the payment of the sum of \$219.00 on account. That thereafter and on or about the 27th day of October, 1913, R. [18] Waymire filed his verified answer to the complaint in said action; that thereafter a trial was had of the issues therein, and after judgment had been entered against R. Waymire, the said Court on the 11th day of August, 1914, granted the motion of R. Waymire for a new trial thereof; that plaintiff in said suit, as this plaintiff is informed and believes, is now prosecuting an appeal from the order of said Court granting the said

motion for a new trial. That plaintiff alleges upon his information and belief that the said sum of \$750.00 sued for in said action, and the sum of \$219.00 admitted to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which by the said Pack, the said defendants are now seeking contribution from this plaintiff, and threatening a forfeiture of his rights and interests in and to said above described claims upon his failure to so contribute, as recited in their said pretended Notice of Forfeiture.

XII.

That on the 30th day of August, 1913, one M. A. Varney, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack filed a suit in the Superior Court of the City and County of San Francisco, State of California, against H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith, S. Schuler and this plaintiff, which said suit is entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a Copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as Individuals, Defendants," and numbered 50,724 in the files and records of the said Su-

perior Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and [19] rendered services to the defendants therein in the sum of \$4,170.00, of which said sum only \$500.00 has been paid; that plaintiff alleges the fact to be that the said action was brought by the said M. A. Varney to recover the sum of \$3,670.00 from the said defendants for the use of two certain automobiles and certain supplies furnished by the said M. A. Varney to the said Pack at his special instance and request, in the years 1911 and 1912 and used by the said Pack to transport men and supplies from the City of Los Angeles and elsewhere to the above described claims on Searles Borax Lake, San Bernardino County, California.

That thereafter and on or about the 20th day of October, 1913, R. Waymire filed his verified answer to the Complaint in said action; that thereafter various proceedings were had therein and a trial thereof was had before the Court, and that on or about the 16th day of July, 1914, R. Waymire moved the Court for a nonsuit in said action, which motion for nonsuit was by the Court granted; that on or about the 7th day of October, 1914, judgment was entered in favor of R. Waymire, which said judgment is now of record in the office of the Clerk of said Superior Court in Volume 77 of Judgments at page 93 thereof. That this plaintiff alleges upon his information and belief that the said sum of \$3,670.00, sued for in said action, and the sum of \$500.00 alleged to have been paid on account therein, constitute

part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which, by the said Pack, the said defendants are now seeking contribution from this plaintiff and threatening to forfeit all of plaintiff's rights, title and interest in and to said placer mining claims, if he does not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A.") [20]

XIII.

That on or about the 26th day of February, 1914, one Raphael Mojica filed an action in the Superior Court in the City and County of San Francisco, State of California, against this plaintiff, his collocators and defendant S. Schuler, as assignee of the defendant Pack, one Henry E. Lee and various other parties to recover the sum of \$1,443.50, which said action is entitled "Raphael Mojica, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, a co-partnership, H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, an association, and Henry E. Lee, Thomas O. Toland, H. C. Fursman, W. Huff, Rudolph Waymire, P. Perkins, H. A. Baker, E. Thompson, Dudley Smith, Stella Schuler, John Doe, Jane Roe, Richard Roe and Mary Roe, Defendants," and is numbered 54,989 in the files and records of said Superior Court; that in his verified complaint in said action the said

plaintiff pretends to be the assignee of thirty certain Mexican laborers, and pretends therein that each of these said Mexican laborers named therein had assigned to him their claims against the defendants therein for doing certain labor and work, in and upon the above described placer claims by way of assessment work thereon, during the year 1912; that said action is now at issue in said Superior Court; that plaintiff is informed and believes and therefore alleges the fact to be that the said sum of \$1,443.50 sued for in said action constitutes a portion of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture Exhibit ("A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above described placer mining claims and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff, and threatening to forfeit all of plaintiff's right, title and interest in and to said placer mining claims if he does not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A"); that plaintiff is informed and believes that no part of said sum of \$1,443.50 sued for in said action has been paid by the said Thos. [21] W. Pack, or by anyone whomsoever for him.

XIV.

That a short time prior to the dates when the said defendant Thos. W. Pack claims to have expended money for the purpose of doing assessment work on the above described placer mining claims, as claimed in defendants' pretended Notice of Forfeiture (Ex-

hibit "A"), one Henry E. Lee, as the duly authorized agent and representative of this plaintiff, and of his co-locators, paid to the said defendant, Thos. W. Pack, for this plaintiff, and for his said co-locators in their respective proportionate shares, the sum of \$1,000.00, as a portion of their *pro rata* contribution for the doing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said actual assessment work thereon; that as plaintiff is informed and believes the said Thos. W. Pack, did so use the said sum of \$1,000.00 for said purpose in said year and that the said amount should be credited to this plaintiff and his co-locators in proportion to their respective interests in the said placer mining claims.

XV.

That plaintiff further alleges that during the year 1911, and prior to the time any money is claimed to have been expended by the said defendant Pack in his said pretended Notice of Forfeiture (Exhibit "A"), the said defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of plaintiff, and his co-locators, in the sum of \$1,836.00, and that the said Henry E. Lee, acting as such agent for plaintiff and his co-locators, directed the said defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of the placer mining claims hereinabove described in said pretended Notice of Forfeiture (Exhibit "A") for the years 1911 and 1912, and that the said defend-

ant Pack agreed with the said Henry E. Lee that he would so utilize and use said money; that plaintiff claims [22] that said sum of \$1,836.00 is and should be a portion of the money expended by the said defendant Pack, as described in the said pretended Notice of Forfeiture Exhibit ("A"); that the said money and indebtedness was money due and owing to this plaintiff and his co-locators from the said defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to the said Henry E. Lee, the duly authorized agent of this plaintiff and his co-locators, and that said amount should be credited to this plaintiff and his co-locators in proportion to their respective interests in their said placer mining claims.

XVI.

Plaintiff further alleges that simultaneously with the service of said pretended Notice of Forfeiture (Exhibit "A") upon plaintiff, the said defendants served upon plaintiff another pretended Notice of Forfeiture, by the terms of which the said defendants claim that the defendant Pack expended during the years 1911 and 1912, the sum of \$5,600.00 for labor and improvements upon one hundred and seventy-five placer claims, among which are included the placer claims in said Exhibit "A," and hereinbefore in this complaint described; that by the terms of said pretended Notice of Forfeiture, so served upon plaintiff simultaneously with the service of said Exhibit "A," as aforesaid, the said defendants claim contribution from this plaintiff twice for the same money and twice for the representation of the placer

claims in this complaint specifically described.

XVII.

Plaintiff has no means of knowing or of ascertaining what, if any, amount of his own money or funds said defendant has expended on said placer mining claims, or upon any of them, for annual representation work for the year 1911, and that the only method whereby plaintiff can procure said information is through this Court and by its order compelling the defendant, Thos. W. Pack, [23] to account for and disclose any and all moneys expended or spent by him upon said placer mining claims, above described, or upon any of them, during the year 1911, for the purpose of representing same, and each and all thereof, for said year, if any money at all was so expended by the said Thos. W. Pack for such purpose, and whose money, if any, was expended by him, how expended, and what amount of the same, if any, was so expended and spent for labor and improvements, or labor or improvements upon the above described claims, or upon any of them, which could lawfully be counted, considered or applied as such representation work, and for the expenditure of which he would be entitled to *pro rata* contribution from this plaintiff.

XVIII.

Plaintiff hereby and herewith offers and stands ready to pay to the said Thos. W. Pack, or these defendants, or either of them, his proportionate share of any moneys belonging to the said defendant Thos. W. Pack which this Court finds were expended by the said Thos. W. Pack on the above described

claims, or any of them, as actual representation work thereon for the year 1911, if the Court finds he so expended any money at all for such purpose.

XIX.

That plaintiff further alleges that if the said defendants are allowed to proceed under said pretended Notice of Forfeiture (Exhibit "A") they will, at the expiration of ninety days from and after the date of the service of the said pretended Notice of Forfeiture, file and record a copy of said Notice of Forfeiture (Exhibit "A") and an affidavit of service, with the County Recorder of San Bernardino County, California, and claim and assert that all the right, title and interest of this plaintiff in and to said placer claims, and each and all thereof, has been duly and legally forfeited and extinguished and thereby and by means thereof a cloud will be cast upon the title and interest of this [24] plaintiff in and to said placer mining claims, and each of them, and plaintiff be compelled to institute and prosecute a great number of suits to remove said cloud, at a great and exorbitant expense; that unless defendants are enjoined and restrained from proceeding to declare the forfeiture of plaintiff's rights in and to said placer claims and each of them as claimed in their said Notice of Forfeiture (Exhibit "A") this plaintiff will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the cloud cast upon his said title and interest in and to each of said placer mining claims.

XX.

That plaintiff has no plain, speedy or adequate

remedy at law in the premises, and unless defendants, and each of them, are restrained and enjoined from declaring a forfeiture of all of plaintiff's right, title and interest in and to said claims, and each thereof, pursuant to and in accordance with the pretended Notice of Forfeiture (Exhibit "A"), plaintiff will be irrevocably and irreparably damaged and injured, and be defrauded or deprived of all of his right, title and interest in and to said placer mining claims, and each of them.

WHEREFORE, plaintiff prays:

1. For a decree of this Court preventing any forfeiture of any right, title, interest or claim of this plaintiff in and to said placer mining claims above described, and in and to each and all of them.

2. For a decree of this Court directing said defendants, and each of them, to account and disclose to this plaintiff, and to this Court, for all moneys, if any, belonging to the said Pack and constituting his own personal funds, and used and expended by him in procuring labor or improvements, or labor and improvements, which could be legally counted, considered or claimed as a representation or annual assessment work for the year 1911, on the above [25] described placer mining claims, and on each of them, and that this Court ascertain and determine the amount, if any, thereof, and the proportion, if any, which this plaintiff should pay.

3. That these defendants, and each of them, their agents, attorneys, servants and employees be permanently restrained and enjoined from taking any steps to perfect or establish any forfeiture of plain-

tiff's rights, titles and interests in or to said placer mining claims, hereinabove described, or in or to any part or portion thereof, or any of them, and that in the meantime during the pendency of this suit, and until the final determination thereof on the merits, said defendants, and each of them, their attorneys, agents, servants, representatives or employees, and each and all of them, be restrained and enjoined from taking any steps to cast a cloud upon the title, or to forfeit or to perfect or establish any forfeiture of plaintiff's rights, titles or interests in or to said placer mining claims hereinabove described, or any part or portion thereof, or any of them.

4. For plaintiff's costs of suit.

5. For such other and further relief as this Honorable Court may deem just and equitable in the premises.

H. L. CLAYBERG.

CLAYBERG & WHITMORE,

Attorneys for Plaintiff. [26]

*In the District Court of the United States, Southern
District of California.*

E. THOMPSON,

Complainant.

VS.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

State of California,
City and County of San Francisco,—ss.

Henry E. Lee, being first duly sworn upon his oath
says:

That he has read the complaint in the above-entitled action, to which this affidavit is attached, and knows the contents thereof; that he has personal knowledge of all the facts and matters therein alleged, and knows them to be true except as to those matters therein alleged upon information and belief, and as to them, he believes them to be true.

That he makes this affidavit for the plaintiff and on his behalf, for the reason that the said plaintiff is now a resident of the City and County of San Francisco, State of California, and is not at the date of the making of this affidavit within said State of California, or within the City and County of San Francisco, wherein this affiant resides and has his office and place of business.

HENRY E. LEE,

Subscribed and sworn to before me this 21st day of
November, 1914.

[Seal]

H. B. DENSON,

Notary Public in and for the City and County of San
Francisco, State of California. [27]

Exhibit "A" [to Bill in Equity].

NOTICE OF FORFEITURE.

710 Claus Spreckles Building,

San Francisco, California, September 14th, 1914.

E. Thompson:

You are hereby notified that I, the undersigned, T. W. PACK, expended during the year 1911 the sum of Twelve Hundred Dollars (\$1200), in amounts of One Hundred Dollars (\$100), for labor and improvements, upon each of the twelve (12) following described placer mining claims:

Those certain placer mining claims situate in and upon Searles Borax Lake, County of San Bernardino, State of California, more particularly named and numbered as follows:

“The Soda No. 68 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 164 of said volume;

“The Soda No. 69 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 156 of said volume;

“The Soda No. 70 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 165 of said volume;

“The Soda No. 71 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 166 of said volume;

“The Soda No. 72 Placer Mining Claim,” the location notice [28] of which said claim is recorded

in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 166 of said volume;

“The Soda No. 87 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 174 of said volume;

“The Soda No. 88 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 174 of said volume;

“The Soda No. 89 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 175 of said volume;

“The Soda No. 90 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 175 of said volume;

“The Soda No. 91 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 176 of said volume;

“The Soda No. 111 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San

Bernardino, State of California, at page number 186 of said volume;

“The Soda No. 112 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 186 of said volume;

You are hereby further notified that said sum of \$1200 (being \$100 for each of said claims) was expended by me for the [29] purpose of complying with the requirements of Section 2324 of the Revised Statutes of the United States and amendments thereof, concerning the performance of annual labor upon mining claims.

You are hereby further notified that the amount of \$100 was the amount required to hold each of said claims for the said year of ending December 31st, 1911, and that said sum of \$1200 was the aggregate amount required to hold said twelve claims for said year 1911.

You are hereby further notified that throughout said year 1911, I was the owner of an undivided one-eighth interest in said claims and therefore a co-owner with you throughout said period, during which you also were the owner of an undivided one-eighth interest in said claims.

You are hereby further notified that subsequent to the making of said expenditures I transferred my said one-eighth interest to S. Schuler, and that she has transferred said one-eighth interest to Joseph K. Hutchinson, who is now the owner thereof.

You are hereby further notified that I, T. W. Pack,

together with said S. Schuler, and said Joseph K. Hutchinson, also undersigned, have received no contribution from you for your proportion, to wit: one-eighth, of said expenditures, do, and each of us does hereby make demand upon you for contribution by you of your proportion of said expenditures, to wit: of the sum of \$150, or one-eighth of said sum of \$1200.

You are hereby further notified that if, within ninety (90) days from the personal service of this notice upon you, you fail or refuse to contribute your proportion of said expenditures, to wit: \$150, or one-eighth of said sum of \$1200, by payment of the same to said Joseph K. Hutchinson, at Room 710, Claus Spreckles Building, City and County of San Francisco, State of California, he being duly authorized to collect said money and receipt for the same, your said interest in said mining claims, and each of them [30] will become the property of the undersigned.

Dated, San Francisco, California, September 14, 1914.

(Signed) S. SCHULER,
 T. W. PACK,
 JOSEPH K. HUTCHINSON,

[Endorsed]: No. B. 50—Eq. U. S. District Court, Southern District of California, Southern Division. In equity. E. Thompson, vs. Thomas W. Pack, Stella Schuler, Joseph K. Hutchinson. Bill in Equity. Filed Nov. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Build-

ing, San Francisco, Attorneys for Complainant.
[31]

*In the District Court of the United States, Southern
District of California, Southern Division.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants,

Restraining Order and Order to Show Cause.

WHEREAS, plaintiff above named has filed his verified bill in equity in the above-entitled cause against the defendants above named praying for certain equitable relief and an order of this Court restraining and enjoining defendants and each of them, during the pendency of this suit and until the final determination thereof upon its merits, from in any way or manner casting a cloud upon the title of or taking any steps toward forfeiting or declaring forfeited any of plaintiff's right, title or interest in and to certain placer mining claims in said bill of complaint and hereinafter fully described, named and numbered; and

WHEREAS, upon a reading of plaintiff's said bill of complaint it satisfactorily appears to the Court therefrom that plaintiff may suffer irreparable and irrevocable damage and injury, before the hearing of the order to show cause hereinafter set forth, unless,

pending the hearing on said order to show cause, said defendants and each of them are by this Court restrained as hereinafter set forth, and other good cause appearing. [32]

NOW THEREFORE, IT IS HEREBY ORDERED that you, the said defendants, Thos. W. Pack, S. Schuler and Jos. K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees are hereby specially restrained and enjoined from in any way or maner taking any steps toward forfeiting or declaring a forfeiture of plaintiff's right, title and interest in and to certain hereinafter described placer mining claims, and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date hereof, served upon plaintiff herein, a copy of which is attached to the said bill of complaint and marked Exhibit "A," until the hearing of the application of plaintiff for an injunction *pendente lite* in this cause, which said application is hereby set for hearing before this Court on the 7th day of December, 1914, or until the further order of this Court;

IT IS FURTHER ORDERED that you and each of you appear before this Court at 10:30 o'clock A. M. on the 7th day of December, 1914, at the courtroom of Division No. 2 of the District Court of the United States for the Southern District of California, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, and then and there to show cause, if any you have, why said

restraining order, as hereinabove made, should not be made permanent during the pendency of this suit and until the final determination thereof on its merits.

Said placer mining claims above-named are described, numbered and named as follows, being situate on Searles Borax Lake, County of San Bernardino, State of California, the location notices of which said placer claims are recorded in Volume 82 of Mining Records in the office of the County Recorder of the said County of San Bernardino, State of California, at the following respective pages of said Volume 82 set down opposite and following the hereinafter [33] described, named and numbered placer mining claims:

"The Soda No. 68 Placer Mining Claim," at page 164 thereof;

"The Soda No. 69 Placer Mining Claim," at page 165 thereof;

"The Soda No. 70 Placer Mining Claim," at page 165 thereof;

"The Soda No. 71 Placer Mining Claim," at page 166 thereof;

"The Soda No. 72 Placer Mining Claim," at page 166 thereof;

"The Soda No. 87 Placer Mining Claim," at page 174 thereof;

"The Soda No. 88 Placer Mining Claim," at page 174 thereof;

"The Soda No. 89 Placer Mining Claim," at page 175 thereof;

"The Soda No. 90 Placer Mining Claim," at page 175 thereof;

"The Soda No. 91 Placer Mining Claim," at page 176 thereof;

"The Soda No. 111 Placer Mining Claim," at page 186 thereof;

"The Soda No. 112 Placer Mining Claim," at page 186 thereof;

Dated this 24th day of November, 1914.

BENJAMIN F. BLEDSOE,

Judge. [34]

[Indorsed]: No. B. 50—Eq. U. S. District Court, Southern District California, Southern Division. In equity. E. Thompson, vs. Thomas W. Pack,

Stella Schuler, Joseph K. Hutchinson. Restraining Order and Order to Show Cause. Filed Nov. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Building, San Francisco, Attorneys for Complainant. Eq. O Bk.— [35]

[Order Continuing Hearing to December 8, 1914.]

At a stated term, to wit, the July Term, A. D., 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the seventh day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable Benjamin F. Bledsoe, District Judge.

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, et al.,

Defendants,

This cause coming on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; it is ordered that this cause be, and the

same hereby is continued until Tuesday, the 8th day of December, 1914, at 10:30 o'clock, A. M., for said hearing. [36]

**[Order Submitting Application for Preliminary
Injunction, etc.]**

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the eighth day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause having come on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; and said application for a preliminary injunction having been argued, in connection with the argument of the application for a prelim-

inary injunction in cause No. B. 46—Equity, E. Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants, by Charles W. Slack, Esq., of counsel for defendants, and by A. V. Andrews, Esq., of counsel for complainant; it was ordered that this cause be, and the same thereby was submitted to the Court for its consideration and decision on complainant's application for a preliminary injunction and the argument thereof. [37]

**[Order Granting Application for Temporary
Injunction, etc.]**

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the eleventh day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause having heretofore been submitted to the Court for its consideration and decision under and pursuant to the order heretofore made and en-

tered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; and the Court having duly considered the same, and being fully advised in the premises, now, in accordance with the conclusions of the Court expressed in its opinion this day filed in cause No. B. 46—Equity, E. Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants, it is ordered that complainant's application for said temporary injunction be, and the same hereby is granted, counsel for complainant to prepare and present a suitable order in accordance herewith. [38]

[Opinion.]

*In the District Court of the United States in and for
the Southern District of California.*

C. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

This matter is before the Court on an order to show cause why a temporary injunction *pendente lite* should not issue restraining the defendants from putting of record certain Notices of forfeiture with Affidavits of Service thereof; such notices being those provided in Section 2324 Revised Statutes of the United States, and Section 1426-o of the Civil Code of the State of California, with reference to

forfeiting of part interests of mining claims.

The bill in equity as filed contains much matter that seems to be immaterial, much that is purely "epithetic," to use an expressive phrase, and a great deal averred upon information and belief, and not positively. With respect to this latter, the Court feels that it should not, of course, consider it upon this order to show cause, because of the fact that under the law the complainant, to be entitled to positive relief at this juncture, and in advance of a hearing, must base his request for such relief upon positive allegations. Laying out of consideration, however, the matters referred to above, it may be said, that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing. Briefly summarized, they are: That the plaintiff in the year nineteen hundred and ten, in conjunction with the defendant Pack, and certain other individuals mentioned, located and recorded [39] one hundred and seventy-five certain placer mining claims, situate in the County of San Bernardino, State of California; that plaintiff is now, and ever since the day of said location, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; that during the month of September, in the year nineteen hundred and fourteen, the defendant herein, caused to be served upon plaintiff a certain notice of forfeiture, set out in the bill of complaint, and by which it was sought, pursuant to the sections of the Revised Statutes and Civil Code above referred to, to forfeit the

title of plaintiff in and to each and all of the one hundred seventy-five (175) described placer mining claims heretofore referred to; that said notice contained the appropriate statements that unless plaintiff, within ninety days after the service of the same upon him, paid to the defendants, or to the defendant Joseph K. Hutchinson, for said defendants, the sum of seven hundred dollars (\$700), claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack, upon said claims, in the years nineteen hundred and eleven (1911) and nineteen hundred twelve (1912), that the interest of plaintiff would become forfeited to the said Joseph K. Hutchinson; plaintiff then alleges that the said Pack did not expend, or cause to be expended, of his own money, during the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912), or at any other time, the sum of fifty-six hundred dollars (\$5600), of which the said seven hundred dollars (\$700) was the one-eighth part, upon or for, the benefit of said placer mining claims, or at all; that at least twenty-eight hundred and thirty-six (\$2836) was contributed by plaintiff and his co-locators to the defendant Pack, for the purpose of doing the assessment work upon the claims mentioned, for the years nineteen [40] hundred and eleven (1911) and nineteen hundred and twelve (1912); plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims, was obtained and is held for the sole use and benefit of the Foreign Mines and Development Company, and the American

Trona Company and the California Trona Company. It is also alleged that in the year nineteen hundred and twelve (1912) while plaintiff and his co-locators were engaged in the performance of the annual assessment work upon said claims they were forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company.

If these facts thus alleged be true, and at this time the Court must assume them to be true, because no affidavit or answer in opposition to or in explanation of them, has been presented by the defendants, then it would appear that the defendants have no right to claim or exact a forfeiture, as against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of defendants, leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, in so far as they seem to have effected a divestiture of plaintiff's undivided interest in and to the mining property in question. On such a state of facts I apprehend the Court, after an accounting or other appropriate investigation, would make a decree determinative of the rights of the parties and the protection thereof. This decree, under the case as made by the facts to be taken as true, would, in its substantial aspects, be in favor of the plaintiffs. The only question for determination, then, is whether or not the plaintiff should be protected in his rights, pending such final determination

by the Court, and whether or not the strong arm of the Court should be employed at this time to enjoin the [41] defendants from placing of record, that which plaintiff claims would constitute a cloud upon his title, to wit: The notice of forfeiture with the affidavit of service thereof. That it would constitute such a cloud, I think, is indisputably clear. It was held in Pixley vs. Huggins, 15 Cal. 128, that the true test as to whether or not a certain instrument would cast a cloud upon the title, upon the plaintiff's property, was this: "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed be required to offer evidence to defend a recovery? If such proof would be necessary the cloud would exist; if the proof would be unnecessary no shade would be cast by the presence of the deed." This decision has been cited frequently, and I apprehend states the law concisely. In this case it is apparent that the filing of the notice and affidavit of service, would *prima facie* serve to divest plaintiff of his interest in the properties and that it would require extrinsic evidence on his part to defeat a suit of ejectment, based upon the forfeiture apparently evidenced by the notice of labor done and failure to contribute thereto. For these reasons I am constrained to hold that plaintiff has presented a *prima facie* case, free from colorable doubt, is entitled to a temporary injunction *pendente lite*.

Plaintiff's counsel will draft an appropriate order.

BENJAMIN F. BLEDSOE,

Judge.

[Endorsed]: No. B. 46—Eq. United States District Court, Southern District of California, Southern Division. C. Thompson, vs. Thomas W. Pack et al. Opinion re Injunction *Pendente Lite*. Filed December 11, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [42]

[Order for Injunction Pendente Lite.]

District Court of the United States, Southern District of California.

B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

On return of the order to show cause made by me in the above-entitled action on the 24th day of November, 1914, and returnable on the 7th day of December, 1914, and this cause coming on regularly for hearing on the return day thereof, upon the verified bill of complaint. After hearing Messrs. Clayberg & Whitmore for the complainants, and Messrs. Charles W. Slack and Joseph K. Hutchinson, for the defendants, and no sufficient cause to the contrary being shown:

IT IS ORDERED that the said order to show cause be, and the same hereby is made absolute until the final determination of this suit. It is further

Ordered, that you, the said defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees, are hereby specifically restrained and enjoined from in any way or manner taking any steps towards forfeiting or declaring a forfeiture of plaintiff's right, title and interest in, and to those certain placer mining claims named and described in the Bill of Complaint filed herein and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date of the commencement of this suit served upon plaintiff herein, until the final hearing and termination of this suit or until the further order of this court.

The clerk will issue the Writs accordingly.

Dated this 11th day of December, 1914.

BENJAMIN F. BLEDSOE,

Judge of said District Court. [43]

[Indorsed]: "No. B. 50—Eq. In the District Court of the United States in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Order for Injunction *Pendente Lite*. Filed Dec. 15, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Clayberg & Whitmore, Attorneys for Dfts. Eq. Order Book." [44]

*In the District Court of the United States, Southern
District of California.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

**Notice of Motion for Order Vacating Order for
Injunction Pendente Lite and Dissolving
Injunction Pendente Lite.**

To E. Thompson, Complainant above named, and to
Messrs. H. L. Clayberg and Clayberg & Whit-
more, His Attorneys;

You and each of you will please take notice, that
on Saturday, the 19th day of December, 1914, at the
hour of 10:30 o'clock A. M., or as soon thereafter as
counsel can be heard at the courtroom of the above-
entitled court, Southern Division thereof, in the Fed-
eral Building, in the city of Los Angeles, County of
Los Angeles, State of California, defendants above
named will move said Court for an order vacating the
order granting an injunction *pendente lite* in the
above-entitled cause, heretofore and on the 11th day
of December, 1914, given, made and entered in the
above-entitled cause, and for a further order dissolv-
ing the injunction *pendente lite* issued pursuant
thereto.

Said motion will be made upon the following
grounds:

1. That the allegations of the complainant's bill on file in the above-entitled cause, taken in connection with the allegations contained in the affidavits hereinafter mentioned and served herewith show that complainant is not entitled to the order granting said injunction *pendente lite*.

2. That the above-entitled cause does not present a case for the [45] making of said order for an injunction *pendente lite*.

3. That defendants, and each of them, will be irreparably injured if said order is not vacated and said injunction dissolved.

4. That said order does not provide for any security for defendants' costs and damages and it appears from the affidavits served herewith that complainant is financially irresponsible.

Said motion will be made upon the affidavits of Joseph K. Hutchinson, Stella Schuler and Thomas W. Pack, the defendants above named, served and filed herewith, and upon all the records, papers, proceedings and files in the above-entitled action, and upon this Notice of Motion and upon oral testimony to be adduced at the hearing of said motion.

Dated, Los Angeles, Cal., December 14th, 1914.

JOSEPH K. HUTCHINSON,

Attorney for Defendants.

[Indorsed]: Original. No. B. 50—Eq. United States District Court, Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thos. W. Pack et al., Defendants. Filed Dec. 14, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Notice of Motion to Vacate

Order for Injunction *Pendente Lite*. Pursuant to Rule 49. E. L. Ball, Attorney at Law, 737 Consolidated Realty Bldg., Los Angeles, Cal., is hereby designated as the person on whom to serve papers in this cause. Joseph K. Hutchinson, Attorney for Defendants, San Francisco, Cal. [46]

*In the District Court of the United States, Southern
District of California.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

**Affidavit of Joseph K. Hutchinson [on Motion to
Vacate Order for Injunction Pendente Lite.]**

State of California,

County of Los Angeles,—ss.

JOSEPH K. HUTCHINSON, being first duly sworn, deposes and says:

That he is, and at all the times herein mentioned, was a white male citizen of the United States, and a resident and citizen of the State of California, over the age of twenty-one years, and one of the defendants in the above-entitled cause; that the interests of affiant in the subject matter of said cause are joint with and inseparable from the like interests of the other two defendants in said cause; that affiant makes this affidavit for and on behalf of each and all

of the said defendants above named, including affiant;

That affiant has read the Bill of Complaint on file in said cause, and knows the contents thereof, and each and every allegation therein contained;

That heretofore, and on or about, to wit; the 14th day of January, 1914, S. Schuler, one of the defendants above named, made, executed, acknowledged and delivered to affiant her certain grant, bargain and sale deed conveying to affiant all the right, title, and interest, to wit, an undivided one-eighth interest, of the said defendant [47] Schuler in and to the 175 placer mining claims referred to in Section I of the said Bill of Complaint on file herein, said 175 placer mining claims being situate in and upon Searles Borax Lake in the county of San Bernardino, State of California; that thereafter, and in said month of January, 1914, said deed was duly recorded in the office of the County Recorder of said County of San Bernardino; that at the time the said defendant Schuler conveyed her said interest in said placer mining claims to affiant the said interest so conveyed stood upon the records of the County Recorder in and for the said county of San Bernardino in the name of the said defendant Schuler, and had so stood in her name for more than one year prior to the date of said transfer; that affiant knew at the time of the said conveyance by the said Schuler to him, and had known for a long time thereto, that the said interest of the said Schuler so stood upon the records of the County Recorder of the county of San Bernardino, in the name of the said Schuler, without

any cloud upon or encumbrance against said interest appearing upon the face of the said records; that affiant relied upon his said knowledge of said records in purchasing said interest from said Schuler, and, pursuant thereto, in taking said deed and conveyance; that at the time of the said conveyance by the said Schuler to affiant, affiant had no knowledge, notice or belief of whatsoever kind or nature of the existence of any claims, rights or equities of whatsoever kind or nature against or related to in any way whatsoever the said interest of the said Schuler, and owned, held or claimed by persons other than the said Schuler; that at the time of the said conveyance by the said Schuler to affiant, affiant did not know nor did he have any knowledge, notice or belief of whatsoever kind or nature, of the existence of the deed and conveyance referred to in Section V of the Bill of Complaint on file herein from the said Schuler as grantor to one J. A. Shellito, as grantee, whereby the said Schuler transferred and conveyed to the said Shellito all of her right, title and interest in and to said notice or belief of whatsoever [48] kind or nature as to the fact, referred to in Section V of the said Bill of Complaint, that the said Schuler had on the 25th day of December, 1913, or at any other time, made, executed, acknowledged and delivered her deed and conveyance to the said Shellito, or had made, executed, acknowledged and delivered any other deed, or made any other transfer to any other person whomsoever; that affiant took said conveyance from said Schuler as an innocent purchaser and wholly without notice of already existing rights, claims or

equities against the interest so conveyed by Schuler to affiant, belonging to said Shellito or anyone whomsoever; affiant denies that, at the time of receiving said conveyance, or at any other time, or at all, he was fully, or at all, informed and had full, or any other, knowledge, or was fully, or at all, informed, or had full, or any other, knowledge, that the said Schuler had conveyed all, or any portion of, her rights, interests, claims and property, or all, or any of, her rights, or interests, or claims, or property, in said conveyance described, to the said J. A. Shellito, or any other person whomsoever, a long time prior to the execution of said conveyance by said Schuler to affiant, or at any other time, or at all;

That for and in consideration of the said conveyance by said Schuler to affiant, and at the time of said conveyance, and as a part thereof, affiant paid to said Schuler, and said Schuler received and accepted from affiant a certain sum of money in cash; that affiant made and completed said purchase from said Schuler of her said interest, in good faith, and without intention to, by the said purchase, defraud or injure anyone whomsoever;

Affiant denies that he took said conveyance from said Schuler in pursuance of a combination and conspiracy, or a combination, or conspiracy, by and between, or by, or between, the defendants in the above-entitled cause, or any of them, and the Foreign Mines & Development Company, the American Trona Company, and the California [49] Trona Company, of the Foreign Mines & Development Company, or the American Trona Company, or the California

Trona Company, wherein and whereby, or wherein, or whereby, the defendants above named, or any of them, and the said corporations, or any of the said corporations, confederated and combined, or confederated, or combined, together to injure plaintiff above named and to deprive and defraud him, or deprive, or defraud him, or to injure plaintiff above named, or defraud him of all, or any portion of, his right, title and interest, or all, or any portion of, his right, or title, or interest in and to, or in, or to, said placer mining claims;

Affiant denies that the said conveyance by the said Schuler to affiant was made and done, or was made, or done, pursuant to and in order to carry out a combination and conspiracy, or a combination, or conspiracy, or pursuant to, or in order to carry out a combination and conspiracy, or a combination, or conspiracy, to injure plaintiff and to deprive and defraud him, or deprive, or defraud him, or to injure plaintiff, or to deprive, or defraud him, of all, or any portion of, his right, title and interest, or all, or any portion of, his right, or title, or interest, in and to, or in, or to, said placer mining claims, and each and all of them, or said placer mining claims, or each, or all of them; affiant denies that said conveyance by said Schuler to affiant was made and done or was made, or done, wholly and totally, or wholly, or totally, without a valuable or other consideration;

Affiant denies that the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company have, or that the said Foreign Mines & Development Company, or the

American Trona Company, or the California Trona Company has, fraudulently, or in any other manner, attempted to procure the right, title and interest of Pack, one of the defendants above named, or the right, or title, or interest of the said Pack, in and to said placer locations, or in, or to, said placer locations for the said [50] or any other purpose, of using the said interest of the said Pack in and to said locations or in, or to, said locations, in such a way and manner, or in such a way, or manner as to destroy all, or any portion of, plaintiff's rights and interest, or plaintiff's rights, or interest, or any part thereof, or of both or either thereof, therein, and to defraud plaintiff above named, out of all, or any portion of, interest in and to, or in, or to, said claims, and each of them, or any of them, or to said claims, or each of them, or any of them, or in such a way, or manner, as to destroy all, or any portion of, plaintiff's rights and interest, or rights, or interest, or any part or portion thereof, or of either or both thereof, therein, or to defraud plaintiff above named out of all, or any portion of, interest in and to, or in, or to, said claims, or any of them; affiant denies that he has been acting as the agent, representative and attorney, or as agent, or as the representative, or attorney, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or of the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, in endeavoring to deprive and defraud, or to deprive, or defraud, plaintiff of his rights and title, or rights, or title, or any

part or portion thereof, or either or both thereof, in and to, or in, or to, said placer mining locations; affiant denies that, under the direction and orders, or under the direction, or orders, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, fraudulently, or in any other manner, he obtained said transfer of the said one-eighth interest in and to, or in, or to, said placer mining claims, from said Schuler, in pursuance to a combination and conspiracy, or in pursuance to a combination, or conspiracy entered into [51] and carried on, or entered into, or carried on, by and between, or by, or between, said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and the said defendants herein, or any of them, or by and between, or by, or between, said Foreign Mines & Development Company, American Trona Company, and the California Trona Company, or said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the said defendants herein, or any of them, to injure plaintiff and defraud and deprive him, or to injure plaintiff, or defraud him of all, or any portion, of his right, title and interest, or all, or any portion of, his right, or title, or interest, in and to, or in, or to,

said claims, and each of them, or in and to, or in, or to, said claims, or each of them, or that he obtained the said transfer of the said one-eighth interest in and to, or in, or to, said placer mining claims, in pursuance of any combination and conspiracy, whatsoever, or in pursuance of any conspiracy whatsoever;

Affiant denies that in further pursuance of said, or any other combination and conspiracy, or said, or any other, combination, or conspiracy, and under the orders and direction, or under the orders, or direction, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or that in further pursuance of said, or any other, combination and conspiracy, or said, or any other, combination, or conspiracy, or under the orders and directions, or under the orders, or directions, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the [52] California Trona Company, or any of them, affiant and his co-defendants, or any of them, caused to be served upon plaintiff notice of forfeiture referred to in the Bill of Complaint on file herein; affiant denies that the said transfer of the said one-eighth interest in and to, or in, or to said claims by the said Schuler to affiant, and the serving of said notice of forfeiture upon the same, or the said transfer of the said one-eighth

interest in and to, or in, or to, said claims, by the said Schuler to affiant, or the serving of the said notice of forfeiture upon the plaintiff, was all done, or that any part thereof was done, in pursuance to and in the carrying out of, or in pursuance to, or in the carrying out of, a combination and conspiracy, or a conspiracy, entered into by and between, or by or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between, the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and the defendants above named, or any of them, or by and between, or by, or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between, the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the defendants above named, or any of them; affiant denies that the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, and the defendants above named, or the defendants above named, or any of them, confederated together, for the purpose of injuring the plaintiff and depriving and defrauding him of, or for the purpose of injuring plaintiff, or defrauding him of, all, or any portion of his rights, title and

interest, or all, or any portion of, his right, or title, or interest, in and [53] to, or in, or to, said placer mining claims;

Affiant denies that the notice of forfeiture was prepared and served upon plaintiff, or was prepared, or served, upon plaintiff, pursuant to and in the furtherance of, or pursuant to, or in the furtherance of, such, or any, other combination and conspiracy, or of such, or any other, conspiracy, between the defendants above named, or any of them, and the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or between the defendants above named, or any of them, and the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or all or any of them; affiant denies that neither said Pack, defendant above named, nor any of the defendants above named, or their alleged co-conspirators, are entitled to any contribution from plaintiff in any sum or amount whatsoever;

And further answering Section XIX of said Bill of Complaint, affiant alleges the plaintiff has a plain, speedy and adequate remedy at law in the premises by way of payment of complainant's portions of the sums so expended for the performance of assessment work for the year 1911, and the demanding, procurement and recordation of a receipt for such payment as provided by Section 1426-o of the Civil Code of

the State of California and the recordation of such a receipt as effectually removes any cloud arising from the recordation of the affidavit of service of Exhibit "A" as any decree of this court or any other court can or will; and that affiant is irreparably injured in the event that complainant neglects or refuses to pay his said proportion of said sums in that affiant loses entirely the benefit and effect of his said Notice of Forfeiture through failure to record an affidavit of the service of [54] the same within ninety (90) days after said service, as required by said Section 1426-o of the Civil Code of the State of California, affiant being restrained from recording said affidavit of service by order of the above-entitled Court.

JOSEPH K. HUTCHINSON.

Subscribed and sworn to before me this 14 day of December, 1914.

[Seal]

SYDNEY VAIL PARDEE,

Notary Public in and for the County of Los Angeles,
State of California. [55]

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and
JOSEPH K. HUTCHINSON,

Defendants.

**Affidavit of Defendant Thomas W. Pack, on Motion
to Dissolve Injunction Pendente Lite.**

State of California,

County of Los Angeles,—ss.

Thomas W. Pack, being duly sworn, deposes and says: That he is and at all the times herein mentioned was, a white male citizen of the United States and a resident and citizen of the State of California, over the age of twenty-one years, and one of the defendants in the above-entitled cause; that the interests of affiant in the subject matter of said cause are joint with and inseparable from the like interests of the other two defendants in said cause; that affiant makes this affidavit on motion to dissolve the injunction *pendente lite* heretofore given, made and entered by the above-entitled court in said cause, for and on behalf of each and all of the said defendants, including affiant;

That affiant has read the bill of complaint on file in said cause and knows the contents thereof and each and every allegation therein contained; that all of the facts set forth and attempted to be set forth in said Bill of Complaint are within the personal knowledge of affiant;

That in the year 1910 affiant personally paid out and expended of his own moneys all of the expenses and costs and every expense and cost of locating and recording in the names of E. Thompson, complainant herein, H. C. Fursman, W. Huff, H. A. Baker, R. [56] Waymire, P. Perkins, and D. Smith and affiant as set forth in Section I of the Bill of Complaint

on file herein, the placer mining claims described in said bill, reference to which is hereby made for a more complete description thereof; that said E. Thompson, complainant herein, H. C. Fursman, W. Huff, H. A. Baker, R. Waymire, P. Perkins and D. Smith did not contribute or pay to affiant, nor have they ever contributed or paid to affiant, nor did any of them contribute nor pay to affiant nor have any of them ever contributed or paid to affiant, said money so paid out and expended by affiant for said expenses and costs, or any part or portion thereof;

Affiant alleges and affirms that he did pay out and expend of his own moneys, during the month of December, 1911, the sum of twelve hundred dollars (\$1200), in amounts of one hundred dollars (\$100), with the intent and for the purpose of complying with the requirements of Section 2324 of the Revised Statutes of the United States and amendments thereof, concerning and providing for the performance of annual labor upon mining claims, as to each and all of the said certain twelve placer mining claims hereinbefore referred to and more fully described in Bill of Complaint on file herein, and with the intent and purpose of so complying with the said requirements of Section 2324 of the said Revised Statutes as to and for the year 1911; that as to said sum of twelve hundred dollars (\$1200) so paid out and expended by affiant as aforesaid, with the intent and for the purpose aforesaid, affiant alleges that all of said sum was so paid out and expended in the manner prescribed by law as being the proper manner in which to comply with said requirements of

said Section 2324 of said Revised Statutes; that the co-owners of affiant in the said hereinabove referred to placer mining claims, including complainant, have not contributed or paid to affiant, nor has any of them contributed or paid to affiant at any time, or at all, any part or portion whatsoever of said sum of twelve hundred dollars (\$1200) paid out and expended by affiant as [57] hereinabove alleged, nor have they, nor has any of them, ever tendered or offered any part or portion whatsoever of said sum of twelve hundred dollars (\$1200) to affiant, except as in the Bill of Complaint set forth; affiant denies that complainant or any of his co-locators or anyone on their behalf or on behalf of either of them, expended any money for or performed any representation work in or for the year 1911 on said twelve placer mining claims or either thereof heretofore referred to, or that any representation work was done on said twelve claims, or either or any of them, other than the work done by affiant as hereinabove set out.

Affiant denies that he has ever conspired and combined or conspired or combined with the other defendants in this suit and the Foreign Mines & Development Company, the American Trona Company and the California Trona Company or with any or either of them to injure complainant and to deprive and defraud or to deprive or to defraud complainant of all or any of complainant's right, title and interest, or right, or title, or interest in and to, or in, or to, the placer mining claims described in said Bill of Complaint; affiant denies that he caused the Notice of Forfeiture, Exhibit "A," to be served upon com-

plainant in pursuance of a, or any, combination or conspiracy or of a, or any, combination or conspiracy, and under the orders and directions or under the orders or under the directions of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or any or either of them;

Affiant denies that the sum of seven hundred and fifty dollars (\$750) or any part of said sum sued for in the action of "W. W. Colquhoun, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, a copartnership, Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, Defendants," and numbered 46,604 in the records of the Superior Court of the State of California, [58] in and for the City and County of San Francisco, referred to in section IX of the Bill of Complaint on file herein, constitutes part of the amount which affiant and his codefendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been paid by affiant in the year 1911 for doing the assessment work on the said twelve placer mining claims; affiant alleges that neither the said sum of seven hundred and fifty dollars (\$750) nor any part of said sum constitutes a part or portion of the said sum of twelve hundred dollars (\$1200) referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of three thousand, six hundred and forty-five dollars (\$3645) or any part of said sum sued for in the action of "M. A. Varney,

Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, and Thos. W. Pack, Henry E. Lee and T. O. Toland, a copartnership, defendants," and numbered 46692, in the records of the Superior Court of the State of California, in and for the City and County of San Francisco, referred to in Section X of the Bill of Complaint on file herein, constitutes part of the amount which affiant and his co-defendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been paid by affiant in the year 1911 for doing the assessment work on the said twelve placer mining claims; affiant alleges that neither said sum of three thousand six hundred and forty-five dollars (\$3645) nor any part thereof constitutes a part or portion of the said sum of twelve hundred dollars (\$1200) referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of seven hundred and fifty dollars (\$750) or any part of said sum sued for in the action of "W. W. Colquhoun, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, [59] P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a co-partnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals. Defendants," and numbered 50723 in the files and records of the Superior Court of the State of California, in and for the City and County of San Francisco, referred to in Section XI of the Bill of Complaint on file herein, constitutes part of the amount

which affiant and his co-defendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been paid by affiant in the year 1911 for doing the assessment work on the said twelve placer mining claims; affiant alleges that neither said sum of seven hundred and fifty dollars (\$750) or any part of said sum constitutes a part or portion of the said sum of twelve hundred dollars (\$1200) referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of three thousand six hundred and seventy dollars (\$3,670) or any part of said sum sued for in the action of "M. A. Varney, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals, Defendants," and numbered 50,724 in the files and records of the Superior Court of the State of California, in and for the City and County of San Francisco, referred to in Section XII of the Bill of Complaint on file herein, constitutes part of the amount which affiant and his codefendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been paid by affiant in the year 1911 for doing the assessment work on the said twelve placer mining claims; affiant alleges that neither said sum of three thousand six hundred and seventy dollars (\$3,670) nor any part [60] thereof constitutes a part or

portion whatsoever of the said sum of twelve hundred dollars (\$1200) referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of one thousand four hundred and forty-three and 50/100 Dollars (\$1,443.50) or any part of said sum sued for in the action of "Raphael Mojica, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, a copartnership, H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, an association, and Henry E. Lee, Thomas O. Toland, H. C. Fursman, W. Huff, Rudolph Waymire, P. Perkins, H. A. Baker, E. Thompson, Dudley Smith, Stella Schuler, John Doe, Jane Roe, Richard Roe and Mary Roe, Defendants," and numbered 54,989 in the files and records of the Superior Court of the State of California, in and for the City and County of San Francisco, referred to in Section XII of the Bill of Complaint on file herein, constitutes part of the amount which affiant and his codefendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been paid by affiant in the year 1911 for doing the assessment work, on the said twelve placer mining claims; affiant alleges that neither said sum of one thousand four hundred and forty-three and 50/100 dollars (\$1,443.50) nor any part of said sum constitutes a part or portion whatsoever of the said sum of twelve hundred dollars (\$1,200) referred to in said Notice of Forfeiture, and hereinabove al-

leged by affiant to have been paid out and expended by him;

Affiant alleges that on the 18th day of January, 1912, he did receive from one Henry E. Lee, the same person who verified the Bill of Complaint on file herein, the sum of one thousand dollars (\$1,000); affiant denies that said sum of one thousand dollars (\$1,000) so paid to him by said Lee was paid by said Lee as the duly [61] authorized agent and representative of this plaintiff, and of the hereinabove-named co-locators of this plaintiff; affiant denies that said sum of one thousand dollars (\$1,000) so paid to him by said Lee was so paid for the purpose of being applied toward and used in the assessment work for the year 1911 on said twelve placer mining claims; or that said sum or any part thereof was applied toward and used in the assessment work for the year 1911 on said twelve placer mining claims;

That answering the allegations of Section XV of said Bill of Complaint this affiant denies that during the year 1911 and prior to the time any money is claimed to have been expended by affiant in the Notice of Forfeiture hereinabove referred to, or at any other time or at all, affiant was indebted to said Henry E. Lee, the duly authorized agent of plaintiff, and his co-locators, or the duly authorized agent of plaintiff, or his co-locators, or to the said Lee in any other capacity, or as an individual, or personally, or at all, in the sum of eighteen hundred and thirty-six dollars (\$1836), or in any other sum, or at all, and denies that the said Lee, acting as such agent for plaintiff and his co-locators, or that the said Lee in

any other capacity, or as an individual, or personally, or at all, directed affiant to use and utilize or to use or utilize all of the sum of eighteen hundred and thirty-six dollars (\$1,836), or any portion thereof, or so much thereof as might be necessary, in the annual representation of the placer mining claims referred to in said Bill of Complaint for the year 1911 and 1912 or for the year 1911 or for the year 1912, or for any other year, or at all, and denies that affiant agreed with the said Lee that he would so utilize and use, or that he would so utilize or use said money; affiant denies that the sum of eighteen hundred and thirty-six dollars is and should be or is or should be a portion of the money expended by affiant as described in the said Notice of Forfeiture; affiant denies that the said money and indebtedness or money or indebtedness was money due and owing, or was money due or owing to this plaintiff [62] and his co-locators or to this plaintiff or his co-locators from affiant; affiant denies that said money should be credited to this plaintiff and his co-locators or to this plaintiff or to his co-locators in proportion to their respective interests in the said twelve placer mining claims; affiant denies that he had at any time whatsoever owed to the said Lee and to plaintiff and his co-locators, or to the said Lee, or to plaintiff, or to his co-locators, any sum or sums of money whatsoever; affiant alleges that the said Lee is now, and for a long time prior to the date hereof, has been indebted to affiant in a sum in excess of two thousand dollars (\$2,000); that said sum is now wholly due and owing from the said Lee to affiant and unpaid;

And furthering answering the allegations contained in said section XV affiant alleges that the facts and circumstances relating to the signing and delivery of the written acknowledgment of indebtedness to said Henry E. Lee in the sum of \$1,836 referred to in said section are as follows: That at or just prior to the time of the signing and delivery of said written acknowledgment, and several months prior to December, 1911, said Henry E. Lee applied to this affiant for a loan of money, that affiant refused to make a loan, that said Lee was then indebted to affiant in a large sum and that said Lee stated that if affiant would assist said Lee to obtain a loan, said Lee would repay affiant the amount said Lee then stood indebted to affiant, that said Lee then requested affiant to indorse the promissory note of said Lee in order that said Lee might negotiate the same and procure a loan, that affiant refused to indorse the note of said Lee whereupon said Lee requested that affiant give said Lee a written acknowledgment of indebtedness from affiant to said Lee in order that said Lee might obtain a loan on his, said Lee's promissory note secured by assignment of said written acknowledgment of indebtedness, that said Lee requested that said written acknowledgment of indebtedness be given in some odd sum [63] in order that a possible lender might not suspect that the same had been given as an accommodation, that affiant acceded to the said requests of said Lee and gave Lee a written acknowledgment of indebtedness in the form of an "I. O. U." for the sum of \$1,836, for the purpose of enabling said Lee to repay affiant

the amount of said Lee's indebtedness to affiant, that affiant received no consideration for said written acknowledgment, either past or present, that said Lee was unable to procure a loan on the security of said I. O. U., that the same has never been negotiated and is wholly without consideration of any kind whatsoever or at all;

Affiant alleges upon his information and belief that complainant is financially irresponsible and unable to pay his or any proportion of the money expended in doing the assessment work on the aforesaid claims during the year 1911;

That affiant further alleges that complainant has an adequate remedy at law by way of payment of complainant's proportion of the sum so expended in the performance of assessment work for the year 1911, and the demanding, procuring and recordation of a receipt for said payment as provided by Section 1426-o of the Civil Code of the State of California, that the recordation of such receipt as effectually removes any cloud arising from the recordation of the affidavit of service of Exhibit "A" as any decree of this or any other court can or will, and that affiant is irreparably injured in the event that complainant neglects or refuses to pay his said proportion of said sums in that affiant loses entirely the benefit and effect of his said Notice of Forfeiture through failure to record an affidavit of the service of the same within ninety (90) days after said service, as required by said section 1426-o of the [64] Civil Code of the State of California, affiant being restrained from recording said affidavit of service by

order of the above-entitled Court.

THOMAS W. PACK.

Subscribed and sworn to before me this 14 day of December, 1914.

[Seal]

SYDNEY VAIL PARDEE,

Notary Public in and for the County of Los Angeles,
State of California. [65]

*In the District Court of the United States, Southern
District of California.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

**Affidavit of S. Schuler [on Motion to Dissolve
Injunction Pendente Lite].**

State of California,

County of Los Angeles,—ss.

S. SCHULER, being duly sworn, deposes and says: That she is, and at all the times herein mentioned, was a white, female citizen of the United States, and a resident and citizen of the State of California, over the age of 21 years, and one of the defendants in the above-entitled cause; that the interests of affiant in the subject matter of said cause are joint with and inseparable from the like interests of the other two defendants in said cause; that affiant makes this affidavit for and on behalf of each and

all of the said defendants above named, including affiant;

That affiant has read the Bill of Complaint on file in said cause and knows the contents thereof and each and every allegation therein contained;

Affiant denies that, on or about the 25th day of December, 1913, she made, executed, acknowledged and delivered her deed of conveyance to one J. A. Shellito whereby she transferred and conveyed, or whereby she transferred, or conveyed, to said Shellito, or to anyone else whomsoever, all or any portion, of her rights, title and interest, or all, or a portion of, her rights, or title, or interest, in and to, or in, or to, said placer mining claims, or [66] that she delivered any deed and conveyance, or deed, or conveyance, to said Shellito, or to anyone else whomsoever;

Affiant alleges that on or about, to wit, the 25th day of December, 1913, affiant made, signed and acknowledged a deed of conveyance from herself as grantor to one J. A. Shellito as grantee; that said deed conveyed and would have conveyed, had the same been delivered, all of affiant's right, title and interest in and to said placer mining claims; that said deed was so executed by affiant to be placed in escrow, and not to be delivered to the grantee named therein, until certain conditions to be performed by the said grantee named therein, for and on behalf of affiant, had been fully performed; that many of such conditions were impossible of fulfillment and performance within a period of many months after the date of said deed; that other of the said conditions were to be performed and fulfilled by the said Shellito in

favor and on behalf of affiant immediately upon the signing and acknowledgment of said deed; that in and by the terms of said escrow, said deed was to be placed by affiant in the hands of the Security Trust & Savings Bank, a corporation, situate in the city of Los Angeles, county of Los Angeles, State of California, to be held by it as escrow holder, and to be delivered by it to said Shellito, upon the fulfillment and performance of all said conditions; that immediately upon the making, signing and acknowledgment of said deed, affiant at the city and county of San Francisco, State of California, handed the said deed to one Henry E. Lee, the person referred to in the Bill of Complaint on file herein, upon his promise made to affiant to take the same from the said city and county of San Francisco to the said city of Los Angeles, county of Los Angeles, and there to place the said deed in escrow, with said Security Trust & Savings Bank;

That affiant is informed and believes, and therefore alleges the fact to be that the said Lee did not keep said promise so made to affiant, and that he did not place, nor has he ever [67] placed said deed in escrow with said Security Trust & Savings Bank, or elsewhere, pursuant to the terms of said promise made to affiant as aforesaid, or otherwise, or at all;

None of the conditions which were conditions precedent to the delivery by the said Security Trust & Savings Bank as escrow holder for affiant of said deed, has ever been fulfilled or performed by Shellito, or any other person, whomsoever; that said Lee has never returned said deed to affiant; that affiant does

not know where said deed now is, or has she known since the date upon which she handed the same to the said Lee, where the said deed, or in whose possession it, has been; that someone, of whose identity affiant has not personal knowledge, wholly without affiant's consent or knowledge or authority, recorded said deed, in the month of March or April, 1914, in the office of the county recorder of the county of San Bernardino, State of California;

That affiant is informed and believes, and therefore alleges, that the person who so recorded said deed in the said office of the county recorder of the county of San Bernardino, was the said Henry E. Lee;

That thereafter, and on or about, to wit: the 14th day of January, 1914, affiant made, executed, acknowledged and delivered to Joseph K. Hutchinson, one of the defendants, above named, her certain grant, bargain and sale deed, conveying to said Hutchinson all the right, title and interest, to wit: an undivided one-eighth interest, of affiant, in and to the 175 placer mining claims referred to in Section I of the said Bill of Complaint on file herein, which said 175 placer mining claims are situate in and upon Searles Borax Lake, in the County of San Bernardino, State of California; that at the time affiant conveyed her said interest in said placer mining claims to said Hutchinson, the said interests so conveyed stood upon the county records of the county recorder in and for the said county of San Bernardino in the name of affiant and had so stood in her name for more than one year prior to the date of [68]

said transfer without any cloud upon, or incumbrance against, said interest, appearing upon the face of the said records;

That prior to the said execution of the said deed to said Hutchinson, and after the said making, signing and acknowledging of said deed to said Shellito, affiant stated all of the facts of the case to her attorney, one Ezra W. Decoto, Deputy District Attorney of the county of Alameda, State of California, and thereupon and after said statement of all of the facts of the case by affiant to the said Decoto, the said Decoto advised affiant that she could legally, and without liability, or without breach of any duty owed by her to the said Shellito, or to anyone else, make, execute, and acknowledge the said deed to said Hutchinson; that thereafter and in the presence of the said Decoto, and acting upon his advice, the said Schuler made, executed, acknowledged and delivered the said deed to the said Hutchinson;

That at no time prior to the execution and delivery of said deed did affiant tell said Hutchinson, nor did her attorney tell said Hutchinson, nor did either affiant or her said attorney in any way whatsoever notify the said Hutchinson that affiant had made, signed and acknowledged said deed to said Shellito, prior thereto, and on or about, to wit: the said 25th day of December, 1913, or at any other time, or at all;

That for and in consideration of the said conveyance by affiant to said Hutchinson, and at the time of said conveyance, and as a part thereof, said Hutchinson paid to affiant, and affiant received and accepted

from said Hutchinson, a certain sum of money in cash; that said Schuler made and completed said sale to said Hutchinson of her said interest, in good faith, and without intention to, by the said sale, defraud or injure anyone whomsoever;

Affiant denies that she made said conveyance to said Hutchinson in pursuance of a combination and conspiracy, or conspiracy, by and between, or by, or between, the defendants in the above-entitled cause, or any of them, and the Foreign Mines [69] & Development Company, the American Trona Company, and the California Trona Company, or the Foreign Mines & Development Company or the American Trona Company, or the California Trona Company, wherein and whereby, or wherein, or whereby, the defendants above named, or any of them, and the said corporations, or any of the said corporations, confederated and combined, or confederated, together, to injure plaintiff above named and to deprive and defraud him, or to injure plaintiff above named, or defraud him of all, or any portion of, his right, title and interest, or all, or any portion of his right, or title, or interest in and to, or in, or to, said placer mining claims;

Affiant denies that the said conveyance by affiant to the said Hutchinson was made and done, or was made, or done, pursuant to and in order to carry out a combination and conspiracy, or conspiracy, or pursuant to, or in order to carry out a combination and conspiracy, or conspiracy, to injure plaintiff and to deprive and defraud him, or defraud him, or to injure plaintiff, or defraud him, of all, or any portion

of, his right, title and interest, or all, or any portion of, his right, or title, or interest, in and to, or in, or to, said placer mining claims, and each and all of them or said placer mining claims, or each, or all of them; affiant denies that said conveyance by affiant to the said Hutchinson was made and done, or was made, or done, wholly and totally, without a valuable or other consideration;

Affiant denies that in pursuance of said, or any other, combination and conspiracy, or conspiracy, and under the orders and directions, or under the orders or directions of the Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and that in pursuance [70] of said, or any other, combination and conspiracy, or conspiracy, or under the orders and direction, or under the orders, or direction, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, affiant and her co-defendants, or any of them, caused to be served upon plaintiff Notice of Forfeiture referred to in the Bill of Complaint on file herein; affiant denies that the said transfer of the said one-eighth interest in and to, or in, or to, said claims by affiant to the said Hutchinson, and the serving of said Notice of Forfeiture upon the same, or the said transfer of the said one-

eightth interest in or to, or in, or to, said claims by affiant to the said Hutchinson, or the serving of the said notice of Forfeiture upon the plaintiff, was all done, or that any part thereof was done, in pursuance to and in the carrying out of, or in pursuance to, or in the carrying out of, the combination and conspiracy, or a conspiracy, entered into by and between, or by, or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between, the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and the defendants above-named, or any of them, or by and between, or by, or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the defendants above-named, or any of them; affiant denies that the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, [71] and the defendants, above named or the defendants above named, or any of them, confederated together, for the purpose of injuring the plaintiff and depriving and defrauding him of, or for the purpose of injuring plaintiff, or defrauding him

of, all, or any portion of his right, title and interest, or all, or any portion of his right, or title, or interest, in and to, or in, or to, said placer mining claims;

Affiant denies that the Notice of Forfeiture was prepared and served upon plaintiff, or was prepared, or served, upon plaintiff, pursuant to and in the furtherance of, or pursuant to, or in the furtherance of, such or any other, combination and conspiracy, or of such, or any other, conspiracy, between the defendants above named, or any of them, and the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or between the defendants, above-named, or any of them, and the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or all, or any of them; affiant denies that neither said Pack, defendant above named, nor any of the defendants above-named, or the alleged co-conspirators, are entitled to any contribution from plaintiff in any sum or amount whatsoever;

And further answering Section XIX of said Bill of Complaint, affiant alleges that plaintiff has a plain, speedy and adequate remedy at law, in the premises, by way of payment of plaintiff's proportion of the sums so expended for the performance of assessment work for the year 1911, and the demanding, procurement and recordation of a receipt for such payment as provided by Section 1426-o of the Civil Code of

the State of California; that the recordation of such a receipt as effectually removes any cloud arising from the recordation of the affidavit of service of [72] Exhibit "A," as any decree of this Court or any other Court can or will; that affiant is irreparably injured in the event that complainant neglects or refuses to pay his said portion of said sums, in that plaintiff is a non-resident of the State of California, as appears from the Bill of Complaint on file herein, and in that affiant loses entirely the benefit and effect of his said Notice of Forfeiture through failure to record an affidavit of service of the same within ninety days after the said service, affiant being restrained from so doing by order of the above-entitled Court.

S. SCHULER.

Subscribed and sworn to before me, this 14 day of Dec. 1914.

[Seal] SYDNEY VAIL PARDEE,
Notary Public in and for Los Angeles County, State
of California. [73]

[Indorsed]: Original. No. B. 50—Equity. United States District Court. Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thos. W. Pack, et al., Defendants. Filed Dec. 14, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Affidavits of Thos. W. Pack, Stella Schuler and Joseph K. Hutchinson. Pursuant to Rule 49, E. L. Ball, Attorney at law, 737 Consolidated Realty Bldg., Los Angeles, Cal. is hereby designated as the person on whom to

serve papers in this cause. Joseph K. Hutchinson,
Attorney for Defendants. San Francisco, Cal. [74]

**[Order Continuing Hearing on Motion to Vacate
Injunction Pendente Lite.]**

At a stated term, to wit, the July Term, A. D., 1914,
of the District Court of the United States of
America, in and for the Southern District of
California, Southern Division, held at the court-
room thereof, in the city of Los Angeles, on
Friday, the eighteenth day of December, in the
year of our Lord, one thousand nine hundred
and fourteen. Present: The Honorable BEN-
JAMIN F. BLEDSOE, District Judge.

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, et al.,

Defendants.

On the Court's own motion, it is ordered that this
cause, now upon the calendar, pursuant to notice, for
hearing on Saturday, December 19th, 1914, on a
motion to vacate and set aside the order heretofore
made and entered herein granting an injunction
pendente lite, be, and the same hereby is continued
until Monday, the 21st day of December, 1914, at
10:30 o'clock, A. M., for said hearing. [75]

[Order Denying Motion to Vacate Injunction
Pendente Lite etc.]

At a stated term, to wit, the July Term, A. D., 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the twenty-first day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable Benjamin F. Bledsoe, District Judge.

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, et al.,

Defendants.

This cause coming on this day to be heard on defendants' motion to vacate the order heretofore made and entered herein granting an injunction *pendente lite*; John B. Clayberg, Esq., appearing as counsel for complainant; Joseph K. Hutchinson, Esq., appearing as counsel for defendants; I. Benjamin being present as shorthand reporter of the proceedings, and acting as such; now, on motion of John B. Clayberg, Esq., of counsel for complainant, it is ordered that R. P. Henshall, Esq., who is present in Court, be, and he hereby is associated with said John B. Clayberg, Esq., as counsel for complainant; and said

motion having been argued, in connection with the argument of a motion for an order vacating and dissolving the temporary restraining order heretofore made, filed and entered in cause No. B. 57—Equity, Cecil C. Carter, Complainant, vs. Thomas W. Pack, et al., Defendants, in support thereof, by Joseph K. Hutchinson, Esq., of counsel for defendants, and in opposition thereto by R. P. Henshall, Esq., and John B. Clayberg, Esq., of counsel for complainant; and said cause having been submitted to the court for its consideration and decision on said motion and the argument thereof; it is now by the Court ordered that defendants' motion to vacate the order heretofore made and entered herein granting an injunction *pendent lite* be, and the same hereby is denied; and [76] it is further ordered that complainant be, and he hereby is enjoined from making, executing or delivering conveyance, or in any way conveying or disposing of title to the property involved in this cause during the pendency of this proceeding, and until the final determination of this cause on its merits, counsel for complainant to prepare an appropriate draft or order in accordance herewith for signature. [77]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

**Order Denying Motion to Dissolve Injunction
Pendente Lite, Etc.**

BE IT REMEMBERED, that on the 21st day of December, 1914, at 10:30 o'clock A. M. of said day, at the courtroom of the above-entitled court, in the City of Los Angeles, State of California, pursuant to notice duly given, the motion of the defendants Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, in the above-entitled proceeding for an order vacating the order granting an injunction *pendente lite* in the above-entitled action theretofore, and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant to said order of the 11th day of December, 1914, came on regularly for hearing, and was heard, upon all the papers, records and proceedings in said above-entitled proceeding, upon defendants' notice of motion and upon the affidavits of Joseph K. Hutchinson, Thomas W. Pack,

and Stella Schuler on file in the above-entitled proceeding, said defendants appearing by Joseph K. Hutchinson, Esq., their solicitor, and the complainant appearing by J. B. Clayberg, Esq., and R. P. Henshall, Esq., her solicitors, whereupon said motion [78] was argued and after being duly considered by the Court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that said motion for an order vacating the order granting an injunction *pendente lite* in the above-entitled proceeding heretofore and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding and for a further order dissolving the injunction *pendente lite* issued pursuant to said order, be and the same is, denied; it is further ordered, adjudged and decreed that the complainant herein, her attorneys, agents and representatives, or any, or either of them, be, and they are, and each of them is, hereby enjoined and restrained from making, executing or delivering any deed or other conveyance whatsoever, or at all, of the placer mining claims described in the Bill of Complaint on file herein or any of said claims, or from in any way conveying her or any of her interests in and to said claims until the final determination of this proceeding or the further order of this Court.

Dated, Los Angeles, Cal., December 21, 1914.

BENJAMIN F. BLEDSOE,

Judge.

[Indorsed]: No. B. 50—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thomp-

son, Complainant, vs. Thomas W. Pack et al., Defendants. Order Denying Motion to Dissolve Injunction *Pendente Lite*, etc. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. Eq. Order Book. [79]

*In the District Court of the United States, in and for
the Southern District of California.*

No. B. 50—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Assignment of Error.

NOW COME THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON, defendants above named, and make and file this, their assignment of error:

I.

That the District Court of the United States, in and for the Southern District of California, erred in giving, making and entering its order of December 21, 1914, in the above-entitled proceeding, which said order denied the motion of the above-named defendants for an order vacating the order granting

an injunction *pendente lite* in the above-entitled proceeding theretofore and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant thereto.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants. [80]

[Indorsed]: No. B. 50—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Assignment of Error. (Order of Dec. 21, 1914.) Original. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [81]

*In the District Court of the United States, in and
for the Southern District of California.*

No. B. 50—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Petition for an Order Allowing an Appeal.

The above-named defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, conceiving themselves aggrieved by the order entered on the 21st day of December 1914, in the above-entitled proceeding, which said order denied said defendants' motion for an order vacating the order granting an injunction *pendente lite* in the above-entitled action theretofore and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant thereto, do, and each of them does, hereby appeal from said order of the 21st day of December, 1914, to the United States Circuit Court of Appeals, for the Ninth Circuit, and they pray, and each of them prays, that this, their appeal, be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,

JOSEPH K. HUTCHINSON,

Solicitors for Defendants.

And now, to wit, on December 26, 1914, it is ORDERED that the foregoing appeal be allowed as prayed for, upon giving bond on appeal in the sum of \$250.00.

BENJAMIN F. BLEDSOE,

District Judge. [82]

[Indorsed]: No. B. 50.—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Petition for and Order Allowing Appeal. (Order of Dec. 21, 1914.) Original. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco. Cal. Eq. Order Book. [83]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. B. 50—Equity.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That United States Fidelity & Guaranty Company, a corporation, duly incorporated under and by virtue of the laws of the State of Maryland and authorized by its charter and by-law to become sole surety on bonds and undertakings, is held and firmly bound unto E. Thompson in the full and just sum of Two Hundred Fifty Dollars (\$250.00) lawful

money of the United States, to be paid to the said E. Thompson, her executors, administrators or assigns; to which payment the said United States Fidelity & Guaranty Company binds itself by these presents.

IN WITNESS WHEREOF, the United States Fidelity & Guaranty Company has caused these presents to be executed by its duly authorized attorney in fact and has caused these presents to be sealed with the seal of the United States Fidelity & Guaranty Company on this 26th day of December in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, lately, at a District Court of the United States, for the Southern District of California, Southern Division, in a suit depending in said Court between E. Thompson as complainant and Thomas W. Pack, Stella Schuler and Joseph K. [84] Hutchinson as defendants, an order was given on the 21st day of December, 1914, in the above entitled proceeding, which said order denied the motion of the defendants above named for an order vacating the order granting an injunction *pendente lite* in the above entitled action therefore and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant to said order of the 11th day of December, 1914, and the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, having obtained or being about to obtain an order allowing an appeal to reverse the said order in the aforesaid suit, and a citation directed to the said E. Thompson citing and ad-

monishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty days from the date thereof;

Now, the condition of the above obligation is such that if the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson shall prosecute said

and all F. M. K.
N. P.
appeal to effect ~~an~~ answer ~~of~~ damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

[Seal]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

By W. H. Shroder, [Seal]
Its Attorney in Fact.

The addition of the words “and” and “all” in line 19 hereof is made with the full authority of the United States Fidelity and Guaranty Co.

W. H. SHRODER,
Atty. in Fact.

(On margin:) “The premium on this bond is 5.00.
W. H. Shroder, Atty. in fact.”

(Two documentary stamps, 2½ cents, cancelled by
U. S. Fidelity & Guaranty Co., Dec. 24, 1914.) [85]

State of California,
County of Los Angeles,—ss.

On this 26th day of December in the year one thousand nine hundred and fourteen, before me, Frank M. Kelsey, a Notary Public in and for said County and State, residing therein, duly commis-

sioned and sworn, personally appeared W. H. Shroder known to me to be the duly authorized Attorney-in-fact of THE UNITED STATES FIDELITY AND GUARANTY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said company, and the said W. H. Shroder duly acknowledged to me that he subscribed the name of THE UNITED STATES FIDELITY AND GUARANTY COMPANY thereto as principal and his own name as Attorney-in-fact.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

FRANK M. KELSEY,

Notary Public in and for Los Angeles County, State of California. [86]

[Indorsed]: No. B. 50—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants. Undertaking on Appeal. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Form and Sufficiency of Surety to within undertaking approved this 26th day of December, 1914.

BENJAMIN F. BLEDSOE,

Judge.

CHARLES W. SLACK,

JOSEPH K. HUTCHINSON,

Solicitors for Defendants, 923 First National Bank Bldg., San Francisco. Cal. [87]

*In the District Court of the United States in and for
the Southern District of California.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Praeceptum for Record Upon an Appeal.

To the Clerk of the District Court of the United
States, in and for the Southern District of Cali-
fornia, Southern Division:

SIR:—

You are hereby instructed to prepare a certified copy of the record in the above-entitled proceeding for use upon an appeal from the order heretofore given, made and entered in the above-entitled proceeding on the 21st day of December, 1914, denying the above-named defendants' motion for an order vacating the order granting an injunction *pendente lite* in the above-entitled proceeding theretofore and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant thereto; said record will be made up of the following papers, records and proceedings in the above-entitled proceeding:

The bill of complaint therein;

The temporary restraining order and order to

show cause given, made and entered therein on the 24th day of November, 1914;

The minute order given, made and entered in the above-entitled proceeding upon the return of said order to show cause on the 7th day of December, 1914, showing the making of a motion *ore tenus* to dissolve said temporary restraining order and submitting said application for injunction and said motion; [88]

The minute order given, made and entered in the above-entitled proceeding on the 11th day of December, 1914, granting the said complainant's application for an injunction *pendente lite*;

The order given, made and entered in said proceeding on the 11th day of December, 1914, which said order restrained and enjoined defendants from doing certain acts more particularly described in the bill of complaint above referred to and said order;

The injunction *pendente lite* issued pursuant to said last-named order, which said injunction is dated the 15th day of December, 1914;

The notice of motion of the above-named defendants for an order vacating the order granting an injunction *pendente lite* in the above-entitled proceeding theretofore and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant thereto, which said notice of motion was filed and is marked as filed in the above-entitled proceeding on the 14th day of December, 1914;

The affidavit of Thomas W. Pack, one of the de-

fendants above named which said affidavit is referred to in said notice of motion last above named, and which said affidavit was filed and is marked as filed in the above-entitled proceeding on the 14th day of December, 1914;

The affidavit of Stella Schuler, one of the defendants in the above-entitled proceeding, which said affidavit is referred to in said notice of motion last above named, and which said affidavit was filed and is marked as filed in the above-entitled proceeding on the 14th day of December, 1914;

The affidavit of Joseph K. Hutchinson, one of the defendants above named, which said affidavit is referred to in said notice of motion last above named, and which said affidavit was filed [89] and is marked as filed in the above-entitled proceeding on the 14th day of December, 1914;

The minute order of the above-entitled Court continuing said motion last above-named from the 19th day of December, 1914, to the 21st day of December, 1914;

The order given, made and entered in the above-entitled proceeding on the 21st day of December, 1914, which said order denied said motion for an order vacating the order granting an injunction *pendente lite* in the above-entitled proceeding and for a further order dissolving the injunction *pendente lite* issued pursuant thereto;

The assignment of error of the above-named defendants filed with their petition for an order allowing the appeal above specified and referred to;

You will forthwith make up your certified copy of

the foregoing papers and transmit the same, with the original petition for an order allowing an appeal and the citation issued thereon, with the return of the service of said citation, to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,

JOSEPH K. HUTCHINSON,

Solicitors for Defendants. [90]

[Indorsed]: Service of the Within Praecipe for Record on Appeal this 23d day of December, 1914, is Hereby Admitted. H. L. Clayberg, Clayberg & Whitmore, Attorneys for Complainant.

No. B. 50—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants. Praecipe for Record upon Appeal, (Order of Dec. 21, 1914.) Original. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal., [91]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

I, WM. M. VAN DYKE, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing ninety-one (91) typewritten pages, numbered from 1 to 91 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Bill of Complaint, Temporary Restraining Order and Order to Show Cause, Minute Orders of the 7th, 8th, and 11th days of December, 1914, respectively, Opinion of the Court upon making order granting motion for injunction *pendente lite*, Order granting injunction *pendente lite*, Notice of Motion of defendants for order vacating order granting injunction *pendente lite*, and for a further order dissolving injunction *pendente lite*, Affidavits of Joseph K. Hutchinson, Thomas W. Pack, and S. Schuler, respectively, Minute Orders of December 18 and 21, 1914, respectively, Order denying motion for order

vacating order granting injunction *pendente lite*, and for a further order dissolving injunction *pendente lite*, Assignment of Error, Petition for and Order Allowing Appeal, Undertaking on Appeal, and Praecipe for Transcript of Record on Appeal in the above and therein-entitled action; and I do further certify that the above constitute the record on appeal in said action as specified [92] in the said praecipe for transcript of record on appeal, filed on behalf of the appellants in said action.

I do further certify that the cost of said transcript is \$53.20, the amount whereof has been paid me by Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, the appellants in said action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 30th day of December, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence, the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

[Ten Cents Internal Revenue Stamp. Canceled Dec. 30, 1914. Wm. M. V. D.] [93]

[Endorsed]: No. 2539. United States Circuit Court of Appeals for the Ninth Circuit. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Ap-

pellants, vs. E. Thompson, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed December 31, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Nos. 2539 and 2540.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS W. PACK, STELLA SCHULER
and JOSEPH K. HUTCHINSON,

Appellants,

VS.

E. THOMPSON,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal From the United States District Court for
the Southern District of California,
Southern Division.

CHARLES W. SLACK,
Alaska Commercial Building, San Francisco;
JOSEPH K. HUTCHINSON,
First National Bank Building, San Francisco;
Solicitors for Appellants.

Filed this.....day of January, A. D. 1915.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

Rincon Pub. Co. Print, 28 Montgomery St., S. F.

JAN 23 1915

F. D. Monckton;
Clerk.

Nos. 2539 and 2540.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS W. PACK, STELLA SCHULER
and JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALI-
FORNIA, SOUTHERN DIVISION.

STATEMENT OF THE CASE

There are two cases before this court, each of which is on appeal from an order denying a motion (1) to vacate an order granting an injunction *pendente lite*, and (2) to dissolve the injunction issued pursuant to said order, in which the above-named parties are respectively appellants and appellee. They are cases Nos. 2539 and 2540. The facts presented in each of

the two records are substantially the same. The same similarity applies to the questions presented by the appeals. For the sake of brevity and to avoid confusion, appellants embody herein a statement of facts and a discussion of authorities which will be of general application to both appeals. The few particulars in which the respective records on the two appeals differ will be appropriately noted.

Two Bills in equity of complainant and appellee were filed in the District Court on November 24th, 1914. The allegations that are common to each of the bills, and upon which temporary restraining orders and injunctions *pendente lite* were sought, are as follows: (Tr., p. 33. [The references, except where otherwise indicated, are to the Transcript in Appeal No. 2539.])

1. That in 1910 complainant jointly with seven others, one Fursman, one Huff, one Baker, one Waymire, one Perkins, one Smith, and the defendant Pack, located certain placer mining claims on Searles Borax Lake in San Bernardino County, California*. (Tr., p. 3.)

2. That complainant is now, and ever since the date of the locations has been, owner of an undivided one-eighth interest in said claims. (Tr., pp. 3-4.)

3. That neither complainant nor the defendants are now, nor for a long time prior to the commencement of this suit, have they been in the actual possession of the said claims. (Tr., p. 3.)

(*In case No. 2539 the number of claims is placed at 12; in case No. 2540 at 44.)

4. That in September, 1914, defendants caused to be served on complainant a Notice of Forfeiture (Tr., p. 4), a copy of which is attached to the bill of complaint as "Exhibit A", drawn pursuant to Section 2324, U. S. R. S. By the terms of the Notice of Forfeiture attached to the bill of complaint in case No. 2539 notice is given to the complainant that the defendant Pack expended during the year 1911 the sum of \$1200, in amounts of \$100, for labor and improvements upon each of the 12 claims described in the bill of complaint; that said \$1200 was expended by said Pack for the purpose of complying with the requirements of Section 2324, U. S. R. S., concerning the performance of annual labor upon mining claims; that throughout the year 1911 said Pack was the owner of an undivided one-eighth interest in said claims, and, subsequent to the making of said expenditures, transferred his one-eighth interest to the defendant Schuler, who, in turn, subsequently transferred said interest to the defendant Hutchinson, who is now the owner thereof. That, after demand made in said Notice of Forfeiture upon complainant for contributive payment of complainant's proportion of said sum expended by defendant Pack, to wit: The sum of \$150 or one-eighth of said expenditures, further notice is given to the complainant that failure to contribute said sum of \$150 within ninety days of the personal service of the Notice upon the complainant, will result in complainant's interest in said mining claims becoming vested in the parties signing said

Notice. The Notice is signed by each of the defendants.* (Tr., pp. 29-33.)

5. That defendant Pack did not expend in 1911, or during any other year, or at any other time, or at all, \$1200, or any other sum, of his own money or funds upon said claims for labor and improvements, or for any purpose whatsoever. (Tr., p. 5.)

6. That defendant Pack did not expend in 1911, or during any other year, \$100 of his own money or funds upon said claims for labor and improvements, or for any purpose whatsoever. (Tr., pp. 5-6.)

7. That said Notice of Forfeiture does not describe the kind, character, or nature of the labor and improvements claimed to have been performed upon said claims during 1911. (Tr., p. 6.)

8. That complainant is unable to ascertain from said Notice of Forfeiture whether—

(a) Pack claimed to have actually expended of his own money or funds in labor and improvements \$100 upon each of said claims; or—

(b) Whether he expended \$1200 on all of them; or—

(c) Whether he claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done

(*In case No. 2540 the Notice of Forfeiture names \$4400 as the sum expended, \$550 as the sum to be contributed, the number of claims upon which it was expended as 44, and the year for which it was expended as 1912. This difference occurs throughout the Bill in case No. 2540, where reference is made to either the amount expended or the year for which it was expended.)

upon said claims the annual representation work for 1911. (Tr., p. 6.)

9. That complainant cannot ascertain from said Notice of Forfeiture whether—

(a) The amount claimed to have been expended by defendant Pack of his own money or funds upon said claims, if he ever expended any money at all thereon, was of the value of \$100 for each claim; or

(b) Whether of the value of \$1200 for all the claims; or—

(c) Whether such labor and improvements increased the value of each of said claims \$100; or—

(d) Whether they increased the value of them all \$1200; or—

(e) Whether such labor and improvements tended in any way to develop said claims. (Tr., pp. 6-7.)

10. On information and belief that defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said claims for 1911, expended a greater portion or all of such money in—

(a) The transportation of men and supplies to said claims; and—

(b) In furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said claims for the purpose of performing said work during said year. (Tr., p. 7.)

11. That said Notice is executed, made and signed by defendants Pack, Schuler and Hutchinson. (Tr., p. 7.)

12. That said Notice discloses on its face—

(a) That neither the defendant Schuler nor defendant Hutchinson had any interest in said claims in 1911 and 1912, or during the time it is claimed that defendant Pack expended money on said claims; and—

(b) That neither the defendant Schuler nor defendant Hutchinson ever expended any of the money named in the Notice of Forfeiture. (Tr., pp. 7-8.)

13. That on or about December 25th, 1913, defendant Schuler made, executed, acknowledged and delivered her deed and conveyance to one Shellito, whereby defendant Schuler conveyed to Shellito all her right in said claims. (Tr., p. 8.)

14. That on or about January 14th, 1914, defendant Schuler assumed to convey to defendant Hutchinson the same interest that she had theretofore conveyed to said Shellito. (Tr., p. 8.)

15. That defendant Hutchinson at the time of receiving such conveyance, was fully informed and had full knowledge that defendant Schuler had conveyed all right described therein to said Shellito, prior to the execution of the said conveyance from Schuler to Hutchinson. (Tr., p. 8.)

16. That defendant Hutchinson took said conveyance from defendant Schuler—

(a) For the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or for all or a part of them; and—

(b) Not for his own use and benefit; and—

(c) In pursuance of a combination and conspiracy

by and between these defendants and said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, wherein and whereby the defendants and the said corporations confederated and combined together to injure complainant and to deprive and defraud him of all his right in said claims. (Tr., pp. 8-9.)

17. On information and belief that the pretended transfer of the one-eighth interest in said claims by defendant Schuler to defendant Hutchinson, if such transfer was made at all, was made pursuant to and in order to carry out a combination and conspiracy to injure complainant and to deprive and defraud him of all his right in said claims. (Tr., p. 9.)

18. That said pretended transfer to defendant Hutchinson by defendant Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration. (Tr., p. 9.)

19. That, if any consideration at all was paid by defendant Hutchinson to defendant Schuler for said transfer, the same was advanced and paid—

(a) By the Foreign Mines and Development Company, or by the American Trona Company, or by the California Trona Company, or by part or all of them, or—

(b) By some person or persons authorized by them, or part or all of them, or acting for them, or for part or all of them, and on their behalf, or on the behalf of part or all of them. (Tr., pp. 9-10.)

20. That defendant Hutchinson took the title to said one-eighth interest, if he took the title at all,—

(a) For the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them, and—

(b) Not for his own use and benefit. (Tr., p. 10.)

21. That defendant Hutchinson now claims to hold said title to said one-eighth interest in said claims, if such title ever passed to him,—

(a) For the sole and only use and benefit of the said Foreign Mines and Development Company, the said American Trona Company, the said California Trona Company, or for the sole use and benefit of part or all of them, and—

(b) Not for his own use and benefit. (Tr., p. 10.)

22. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, claim rights and interests in said mineral lands, covered by said placer locations so made and recorded by complainant and others. (Tr., p. 10.)

23. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by complainant and others. (Tr., pp. 10-11.)

24. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have, and each and every of them has, as complainant is informed and believes, fraudulently attempted to procure the right of defendant Pack in said locations so made by complain-

ant and others, for the express purpose, and for none other, of—

(a) Using said interest of defendant Pack in said locations in such a way and manner as to destroy all of complainant's right therein, and—

(b) To defraud complainant out of all interest in said claims. (Tr., p. 11.)

25. On like information and belief that defendant Hutchinson has been acting as agent, representative and attorney of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, in endeavoring to deprive and defraud complainant of his right in said locations. (Tr., p. 11.)

26. That defendant Hutchinson, under the direction and orders of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, fraudulently obtained said transfer of said one-eighth interest in said claims, if he obtained said transfer at all, from defendant Schuler, in pursuance to the combination and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, and the defendants, and each of them, to injure complainant and defraud and deprive him of all right to said claims. (Tr., pp. 11-12.)

27. That in further pursuance of said combination and conspiracy, and under the orders and direction of said Foreign Mines and Development Com-

pany, the American Trona Company, and the California Trona Company, or all or part of them, the defendants caused to be served on complainant said Notice of Forfeiture. (Tr., p. 12.)

28. That the fraudulent transfer of said one-eighth interest by defendant Schuler to defendant Hutchinson, if any transfer was made at all, and the serving of said Notice of Forfeiture on complainant, was all done in pursuance to and in the carrying out of a combination and conspiracy entered into by and between said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or all or part of them, and defendants and each of them, confederated together for the purpose of injuring complainant and depriving and defrauding him of all his right in said claims. (Tr., p. 12.)

29. On information and belief that said Notice of Forfeiture was prepared and served upon complainant pursuant to and in furtherance of such combination and conspiracy between defendants and the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., p. 13.)

30. On information and belief that defendant Pack never, during 1911 and 1912, or at any other time, expended or caused to be expended, the sum of \$1200 of his own funds or money, or any other sum or amount, in and upon said claims or upon one or any of them, for any purpose whatsoever. (Tr., p. 13.)

31. On information and belief, that neither defendant Pack nor any of the defendants, or their co-conspirators, are entitled to any contribution from complainant in any sum whatsoever. (Tr., p. 13.)

32. Complainant is informed and believes that none of the money defendant Pack claims to have expended for representation work, or for labor and improvements, or labor or improvements, on the claims, or any thereof, if expended by said Pack at all, was expended by him for the annual representation and assessment work upon said claims, or any of them, as required by law. (Tr., p. 13.)

33. That defendant Pack paid the money set forth in said Notice of Forfeiture, if he paid any money at all, for—

(a) Certain goods, wares and merchandise furnished to certain laborers employed by complainant and his co-locators doing assessment work on said claims in the years 1911 and 1912, and for—

(b) Automobile hire in transporting said laborers and supplies to and from said claims. (Tr., pp. 13-14.)

34. That in January, 1913, one Colquhoun, through his attorney, defendant Hutchinson, filed suit against defendant Pack, one Henry E. Lee, and T. O. Toland, in the Superior Court of the State of California in and for the City and County of San Francisco. (Tr., p. 14.)

35. That in the verified complaint said Colquhoun alleges—

(a) That he is assignor of C. J. & E. E. Teagle;

(b) That \$750 is due him for certain goods, wares and merchandise sold and delivered to said Pack and the other defendants in said suit during 1911 and 1912;

(c) That the same had never been paid. (Tr., p. 14.)

36. On information and belief that the said goods sued for in said action were purchased by said Pack from the said Teagles in Johannesburg, Kern County, California. (Tr., p. 14.)

36a. That the whole amount of said goods, wares and merchandise so purchased by defendant Pack from the said Teagles was \$969. (Tr., p. 14.)

37. That the said Teagles in said suit admit that \$219 has been paid on account. (Tr., p. 14.)

38. On information and belief that said \$750 sued for in said action constitutes part of the amount which the defendants Pack, Schuler and Hutchinson claim in said Notice of Forfeiture to have been paid by defendant Pack in 1911 for doing assessment work on said claims, and for the pretended payment of which defendants are now seeking contribution from complainant. (Tr., p. 15.)

39. That in February, 1914, judgment was rendered in said suit against defendant Pack, in plaintiff's favor, in the whole amount sued for. (Tr., p. 15.)

40. That said judgment has never been satisfied or discharged, either in whole or in part, or set aside, vacated, or modified. (Tr., p. 15.)

41. That in January, 1913, one Varney, by his

attorney, defendant Hutchinson, filed suit against defendant Pack, Henry E. Lee, and T. O. Toland, in the Superior Court of the State of California, in and for the City and County of San Francisco. (Tr., pp. 15-16.)

42. That in the verified complaint said Varney alleged that during 1911 and 1912 he furnished supplies and rendered services to defendant Pack and the other defendants in said suit in the sum of \$4180, of which said sum only \$535 has been paid. (Tr., p. 16.)

43. That in February, 1913, a judgment was entered in said action against said Pack in favor of plaintiff, in the whole amount sued for. (Tr., p. 16.)

44. On information and belief that said judgment in said suit—

(a) Is still outstanding and of record, and—

(b) Has never been satisfied, set aside, vacated or modified. (Tr., p. 16.)

45. On information and belief that said action was brought by said Varney to recover \$4180 from defendant Pack, Henry E. Lee, and T. O. Toland, for the use of two automobiles and supplies furnished by said Varney to defendant Pack, at his special instance and request, in 1911 and 1912, and used by defendant Pack to transport men hired by complainant and his co-locators to do the annual assessment work on said claims for said years, and supplies for said men, from said City of Los Angeles to said claims. (Tr., p. 16.)

46. On information and belief that said \$4180 sued for in said action constitutes part of the amount

that the defendants claim in their Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from complainant. (Tr., p. 17.)

47. That in September, 1913, said Colquhoun, by his attorneys, defendant Hutchinson and another, filed suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against this complainant and one Fursman, one Huff, one Perkins, one Baker, one Waymire, one Smith, and defendant Schuler, to recover \$750 alleged to be due said plaintiff for the value of certain goods, wares and merchandise. (Tr., pp. 17-18.)

48. That in his verified complaint in said suit said Colquhoun alleges that the said Teagles assigned to him the claim sued on. (Tr., p. 18.)

49. That said Colquhoun further alleges that in 1911 and 1912 the said Teagles furnished certain goods, wares and merchandise to the value of \$750 to the defendants therein, including this complainant. (Tr., p. 18.)

50. That no part of said sum has been paid. (Tr., p. 18.)

51. That said suit was brought by plaintiff for the value of said goods, wares and merchandise claimed to have been sold and delivered by plaintiff's assignors to defendant Pack in 1911, and 1912, and it is claimed that the same were used by a camp of men

doing assessment work on said claims during 1911 and 1912. (Tr., p. 18.)

52. That the whole value of said goods is \$969. (Tr., p. 18.)

53. That said plaintiff in said suit admitted payment of \$219 on account. (Tr., p. 18.)

54. That in February, 1913, said Waymire filed his verified answer to the complaint in said action. (Tr., p. 18.)

55. That thereafter a trial was had of the issues therein. (Tr., p. 18.)

56. That after judgment had been rendered against said Waymire the said court, in August, 1914, granted said Waymire's motion for a new trial thereof. (Tr., p. 18.)

57. That plaintiff in said suit, as this complainant is informed and believes, is now prosecuting an appeal from the order of said court granting said motion for a new trial (Tr., pp. 18-19.)

58. On information and belief that said sum of \$750 sued for in said action and the sum of \$219 admitted to have been paid on account therein constitute part of the amount defendants in this suit claim in their pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from the complainant. (Tr., p. 19.)

59. That in August, 1913, said Varney, by his attorneys, defendant Hutchinson and another, filed

suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against complainant and one Fursman, one Huff, one Perkins, one Baker, one Waymire, one Smith, and defendant Schuler. (Tr., p. 19.)

60. That in the verified complaint in said suit said Varney alleged that during 1911 and 1912 he furnished supplies and rendered services to the defendants therein in the sum of \$4170, of which said sum only \$500 has been paid. (Tr., p. 20.)

61. That said action was brought by said Varney to recover the sum of \$3670 from the said defendants for the use of two automobiles and certain supplies furnished by said Varney to defendant Pack at his special instance and request, in 1911 and 1912, and used by defendant Pack to transport men and supplies from the City of Los Angeles and elsewhere to the said placer mining claims. (Tr., p. 20.)

62. That in October, 1913, said Waymire filed his verified answer to the complaint in said action. (Tr., p. 20.)

63. That thereafter various proceedings were had therein. (Tr., p. 20.)

64. That a trial thereof was had before the Court. (Tr., p. 20.)

65. That in July, 1914, said Waymire moved the Court for a non-suit in said action. (Tr., p. 20.)

66. That the motion for a non-suit was by the Court granted. (Tr., p. 20.)

67. That in October, 1914, judgment was entered in favor of said Waymire. (Tr., p. 20.)

68. On information and belief that said \$3670 and said \$500 constitute part of the amount that the defendants in this suit claim in said pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from complainant. (Tr., pp. 20-21.)

69. That in February, 1914, one Mojica filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against complainant and his co-locators and defendant Schuler, as assignee of defendant Pack, one Henry E. Lee, and various other parties, to recover the sum of \$1443.50. (Tr., p. 21.)

70. That in his verified complaint in said action said plaintiff—

(a) Pretends to be the assignee of thirty certain Mexican laborers;

(b) Pretends therein that each of said laborers had assigned to him their claims against the defendants therein for doing certain labor and work on said claims, by way of assessment work thereon, during 1912. (Tr., pp. 21-22.)

71. That said action is now at issue in said Superior Court. (Tr., p. 22.)

72. On information and belief that said sum of \$1443.50 sued for in said action constitutes a portion of the amount defendants in this suit claim in their said pretended notice of forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing the

assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from the complainant. (Tr., p. 22.)

73. That complainant is informed and believes that no part of said sum of \$1443.50 sued for in said action has been paid by defendant Pack, or any one whomsoever for him. (Tr., p. 22.)

74. That a short time prior to the date when defendant Pack claimed to have expended money for the purpose of doing assessment work on said claims, as claimed in said Notice of Forfeiture, one Henry E. Lee, as the duly authorized agent and representative of complainant, and of his co-locators, paid to defendant Pack for complainant, and for his said co-locators, in their respective proportionate shares, the sum of \$1,000 as a portion of their *pro rata* contributions for the doing of said annual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said annual assessment work thereon. (Tr., pp. 22-23.)

75. That, as complainant is informed and believes, defendant Pack did so use said sum of \$1,000 for said purpose in said year, and that the said amount should be credited to complainant and his co-locators in proportion to their respective interests in said claims. (Tr., p. 23.)

76. That in 1911, and prior to the time any money is claimed to have been expended by defendant Pack in his said Notice of Forfeiture, defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of com-

plainant and his co-locators, in the sum of \$1836. (Tr., p. 23.)

77. That said Henry E. Lee, acting as such agent for complainant and his co-locators, directed defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of said claims for 1911 and 1912. (Tr., p. 23.)

78. That defendant Pack agreed with said Lee that he would so utilize and use said money. (Tr., pp. 23-24.)

79. That complainant claims that said \$1836 is and should be a portion of the money expended by defendant Pack, as described in said pretended Notice of Forfeiture. (Tr., p. 24.)

80. That said money and indebtedness was money due and owing to complainant and his co-locators from defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to said Lee, the duly authorized agent of complainant and his co-locators. (Tr., p. 24.)

81. That said amount should be credited to complainant and his co-locators in proportion to their respective interests in their said claims. (Tr., p. 24.)

82. That simultaneously with the service of said Notice of Forfeiture upon complainant, the defendants served upon complainant another pretended Notice of Forfeiture, by which defendants claim that defendant Pack expended in 1911 and 1912 \$5600 for labor and improvements on 175 placer claims, among

which are included the claims described in this Bill. (Tr., p. 24.)

83. That by the terms of said other pretended Notice of Forfeiture the defendants claim contribution from complainant twice for the same money and twice for the representation of the claims in this Bill described. (Tr., pp. 24-25.)

84. Complainant has no means of knowing or ascertaining what, if any, amount of his own money or funds said defendant has expended on said claims, or on any of them, for annual representation work for 1911 and 1912. (Tr., p. 25.)

85. That the only method whereby complainant can procure said information is through this Court, and by its order compelling defendant Pack to account for and disclose—

(a) Any and all moneys expended or spent by him on said claims, or on any of them, in 1911 and 1912, for the purpose of representing the same for said years, if any money at all was so expended by defendant Pack for such purpose, —

(b) Whose money, if any, was expended by him,—

(c) How expended,—and

(d) What amount of the same, if any, was so expended and spent for labor and improvements upon said claims which could lawfully be counted, considered or applied as such representation work, and for the expenditure of which he would be entitled to pro rata contribution from this complainant. (Tr., p. 25.)

86. Complainant hereby and herewith offers and

stands ready to pay to defendant Pack or these defendants, his proportionate share of any money belonging to defendant Pack which this Court finds were expended by defendant Pack on said claims, as annual representation work thereon for 1911 and 1912, if the Court finds he so expended any money at all for such purpose. (Tr., pp. 25-26.)

87. That if defendants are allowed to proceed under said Notice of Forfeiture, they will, at the expiration of ninety days from and after the day of service of said Notice—

(a) File and record copy of said Notice and an affidavit of service with the County Recorder of San Bernardino County, State of California,—

(b) Claim and assert that all complainant's right in said claims has been duly and legally forfeited and extinguished,—

(c) Thereby and by means thereof a cloud will be cast upon the title of complainant in said claims, and—

(d) Complainant will be compelled to institute and prosecute a great number of suits to remove said clouds at a great and exorbitant expense. (Tr., p. 26.)

98. That unless defendants are enjoined and restrained from proceeding to declare the forfeiture of complainant's right in said claims, as claimed in their said Notice of Forfeiture, this complainant will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the cloud cast upon his said title in and to the said claims. (Tr., p. 26.)

99. That complainant has no plain, speedy or adequate remedy at law in the premises. (Tr., pp. 26-27.)

100. That unless defendants are restrained and enjoined from declaring a forfeiture of all complainant's right, title and interest in said claims, pursuant to and in accordance with the Notice of Forfeiture, complainant will be irrevocably and irreparably damaged and injured, and be defrauded or deprived of all his right in said claims. (Tr., p. 27.)

A temporary restraining order, an injunction *pendente lite* and a permanent injunction are prayed for as well as an accounting. (Tr., pp. 27-28.)

The bills are verified, not by complainant, but by one Henry E. Lee. Lee's connection with the litigation does not appear. He gives as his reason for verifying the Bill the fact that complainant is without the State of California. (Tr., pp. 28-29.)

At the time that the Bills were filed, the District Court, basing its action on the verification of the Bills, made its temporary restraining order in each of these cases directed to the three defendants and appellants named in the bill. At the same time it also issued its order directed to the said appellants requiring them to appear on December 7th and show cause why the temporary restraining order should not be made an injunction *pendente lite*. (Tr., pp. 34-36.)

On December 8th, 1914, appellants appeared before the District Court and showed cause in law why the temporary restraining orders should not be made injunctions *pendente lite*. (Tr., pp. 38-39.) The ob-

jections then made by solicitors for appellants as to the sufficiency of the bills were overruled by the District Court, which thereafter, and on the 11th day of December, 1914, made its order that injunctions *pendente lite* forthwith issue in each of the cases. (Tr., pp. 39-40, 45-46.) Injunctions *pendente lite* following the terms of the temporary restraining orders, were accordingly issued.

Thereafter, and on the 21st day of December, 1914, upon due notice to appellee, the appellants moved the District Court for (1) an order in each of the cases vacating the order directing that the injunction *pendente lite* issue, and (2) a further order dissolving the injunction *pendente lite*. (Tr., p. 47.) This motion was made upon the following grounds:

1. That the allegations of the complainant's bill, taken in connection with the allegations contained in the affidavits served with the Notice of the Motion, show that complainant is not entitled to the order granting the injunction *pendente lite*. (Tr., p. 48.)

2. That the cause does not present a case for the making of the order for an injunction *pendente lite*. (Tr., p. 48.)

3. That defendants, and each of them, will be irreparably injured if said order is not vacated and said injunction dissolved. (Tr., p. 48.)

4. That said order does not provide for any security for defendants' costs and damages, and it appears from the affidavits of defendants served with the Notice of the Motion that complainant is financially irresponsible. (Tr., p. 48.)

The motion was made upon the affidavits of the defendant Hutchinson, the defendant Schuler and the defendant Pack, as well as all the records, papers, proceedings and files in the cause and upon the Notice of Motion. (Tr., p. 48.)

The affidavit of the defendant Pack, directing its allegations toward that portion of the bills hereinabove summarized in paragraphs 5 and 6 of the Statement of the contents of the bills, alleges, in positive terms, that defendant Pack did pay out and expend, of his own moneys, in the manner prescribed by law, during 1911 the sum of \$1200 with the intent and for the purpose of complying with the statutory requirements as to the performance of annual labor on said 12 claims for the year 1911, in connection with and for the purpose of procuring the performance of the annual labor upon the 12 placer mining claims described in the Bills of complaint. It further alleges, in positive terms, that the co-owners of the defendant Pack, including complainant, have not contributed or paid to defendant Pack at any time any part of said sum of \$1200, nor have they ever tendered any part of said sum, except insofar as the offer in the Bills of complaint may be considered a tender. It further denies, in positive terms, that complainant or any of his co-locators expended any money or performed any representation work for 1911 on said placer mining claims, or that any representation work was done on said claims, other than the work done by the defendant Pack. It further, in positive terms, denies the allegations contained in the bills of

complaint with reference to the existence of a combination and conspiracy, to injure complainant and to deprive and defraud him of his interest in said claims, between the defendants and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company; denies that the defendants caused Notice of Forfeiture to be served upon complainant in pursuance of any combination and conspiracy or under the orders of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., pp. 60 to 63.)

Denials, in as positive terms and covering the same matter, are also found in the affidavits of the defendants Schuler and Hutchinson. (Tr., pp. 76 to 79, 53 to 59.)

The affidavit of the defendant Pack further, in positive terms, denies that the sum of \$750, sued for in the action of *Colquhoun vs. Pack et al.*, hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 34 to 40 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been expended by defendant Pack for doing assessment work in 1911; denies that the sum of \$3645, sued for in the action of *Varney vs. Pack et al.*, hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 41 to 46 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been paid by the defendant Pack for doing assessment work for 1911 on

said claims; denies that the sum of \$750, sued for in the action of *Colquhoun vs. Fursman et al.* hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 47 to 58 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been paid by the defendant Pack for doing assessment work on said claims for 1911; denies that the sum of \$3670, sued for in the action of *Varney vs. Fursman et al.*, hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 59 to 68 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been expended by the defendant Pack for doing assessment work for 1911 on said claims; denies that the sum of \$1443.50, sued for in the action of *Mojica vs. Fursman et al.*, hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 69 to 73 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been expended by the defendant Pack for doing assessment work on said claims for 1911. Each of these denials is accompanied by an affirmative allegation on the part of the defendant Pack that none of the sums involved in any of the suits referred to, nor any part of said sums, constitute a part of the \$1200 named in the Notice of Forfeiture. (Tr., pp. 63 to 67.)

The affidavit of the defendant Pack further, in positive terms, denies the matter hereinabove referred to in the Statement of the contents of the bills of com-

plaint in paragraphs numbered 76 to 81 of said Statement: That he was at any time whatsoever indebted to the Henry E. Lee referred to in the above complaint, as the duly authorized agent of complainant and his co-locators, or indebted to the said Lee in any other capacity, or at all, or to the complainant and his co-locators, or to the complainant, or to his co-locators, in the sum of \$1836, or any other sum; that the said Lee, acting as agent for complainant and his co-locators, or in any other capacity, or at all, directed the defendant Pack to utilize the sum of \$1836 in the annual representation of the said mining claims for the years 1911 or 1912, or for any other year; that the defendant Pack agreed with the said Lee that he would so utilize and use said money; that the sum of \$1836 is, and should be, a portion of the money expended by the defendant Pack as claimed in the Notice of Forfeiture; that the money and indebtedness was money due and owing to complainant and his co-locators, or to complainant, or his co-locators, from the defendant Pack; that said money should be credited to complainant and his co-locators, or to complainant, or to his co-locators. Coupled with these denials are positive allegations that said Lee is now, and for a long time prior to the date of the affidavit has been indebted to the defendant Pack in a sum in excess of two thousand dollars, and that said sum is now wholly due and owing from the said Lee to the said Pack, and unpaid. (Tr., pp. 67-68.)

Directed toward, and in explanation of, the same matter, the affidavit of the defendant Pack further, in

positive terms, alleges, that several months prior to December, 1911, said Lee applied to the defendant Pack for a loan of money, and requested the defendant Pack to endorse the promissory note of the said Lee in order that the said Lee might negotiate the same and procure a loan; that defendant Pack refused to endorse said note, whereupon said Lee requested that the defendant Pack give said Lee a written acknowledgment of indebtedness from defendant Pack to said Lee in order that the said Lee might obtain a loan on the promissory note of the said Lee secured by assignment of the said written acknowledgment of indebtedness; that the defendant Pack acceded to the request of the said Lee and gave the said Lee a written acknowledgment of indebtedness in the form of an I. O. U. for the sum of \$1836; that the defendant Pack received no consideration for said written acknowledgment, either past or present; that said Lee was unable to procure a loan on the security of said written acknowledgment; that the same has never been negotiated and is wholly without consideration of any kind whatsoever or at all. (Tr., pp. 69-70.)

As to the matter contained in the bills of complaint and hereinabove referred to in the Statement of the contents of the said bills in paragraphs 74 and 75 of said Statement, the affidavit of the defendant Pack, in positive terms, alleges that said sum of \$1,000 was not advanced for or on behalf of complainant and his co-locators, or any or either of them, but, so far as the defendant Pack knows and to the

best of his knowledge and belief, solely on behalf of said Lee himself. (Tr., p. 67.) The allegations of the affidavit in case number 2540, with reference to the said matter further, in positive terms, aver that the sum of \$1,000 alleged to have been paid by said Lee as the agent and representative of complainant and his co-locators to the said defendant Pack for complainant and his co-locators, was actually paid to the defendant Pack on the 18th day of January, 1912; that at the time said sum was so paid to the defendant Pack, said Lee was indebted to the defendant Pack in a sum in excess of \$1,000; that the defendant Pack elected to, and did, treat said payment of \$1,000 as a payment on account of the said indebtedness of said Lee to the defendant Pack. (Tr. [case No. 2540], pp. 71-72.)

The affidavit of the defendant Pack positively alleges, as to the location in 1910 by complainant jointly with seven others, including the defendant Pack, of the mining claims involved, that the defendant Pack personally paid out and expended out of his own moneys all of the expenses and costs of such location and recordation; and further asserts that the said Waymire, Fursman, Huff, Baker, Perkins, Smith and complainant did not contribute or pay to the defendant Pack, nor have they ever contributed or paid to the defendant Pack, nor have any of them so contributed or paid to the defendant Pack, said money so paid out and expended by him for said expenses and costs, or any portion thereof. (Tr., pp. 60-61.)

On information and belief it is alleged by the de-

fendant Pack that the complainant is financially irresponsible and unable to pay his, or any, portion of the money expended in doing the assessment work on said claims for 1911. (Tr., p. 70.)

The allegations of the affidavits of the defendant Schuler directed toward the matter found in the bills of complaint and hereinabove referred to in the statement of the contents of said bills in paragraphs numbered 13 to 18 and 24 to 26, and 28, deny the execution, acknowledgment and delivery of a deed of conveyance to one Shellito by which defendant Schuler transferred her right in the said claims to said Shellito; alleges that the defendant Schuler did sign and acknowledge a deed of conveyance from herself to said Shellito, which said deed covered, and would have conveyed had the same been delivered, all of the defendant Schuler's right in said mining claims; that said deed was executed to be placed in escrow, and not to be delivered to said Shellito until certain conditions to be performed by said Shellito, for and on behalf of the defendant Schuler, had been fully performed; that many of such conditions were impossible of fulfillment within a period of many months after the date of said deed; that other of such conditions were to be performed immediately upon the signing and acknowledgment of said deed; that said deed was to be placed in escrow in the Security Trust & Savings Bank in Los Angeles; that immediately upon the making, signing and acknowledgment of said deed the defendant Schuler handed it to the said Henry E. Lee, the person referred to in

the bill of complaint, upon his promise made to the said Schuler to take the said deed from the City and County of San Francisco to the City of Los Angeles, and there to place the deed in escrow with said Security Trust & Savings Bank; that none of the conditions, which were conditions precedent to the delivery of the said deed to Shellito, has ever been performed by him, or by any other person; that defendant Schuler does not know where the said deed now is, nor has she known since the date upon which she handed the said deed to the said Lee; that the defendant Schuler has never had any communication whatsoever with or from the said Shellito, by way of complaint, or otherwise, or at all; that the only transaction which the defendant Schuler has ever had with the said Shellito was, as set forth, the making, signing and acknowledgment of the said deed. (Tr., pp. 72-73.)

On information and belief the defendant Schuler alleged that the said Lee did not keep his promise to her, and that he did not place, nor has he ever placed, the said deed in escrow with the said Security Trust & Savings Bank in Los Angeles; that the said Shellito does not now, nor has he for many months past, intended or desired to carry out the fulfillment and completion of said transaction by the performance of the conditions precedent to the delivery of said deed. (Tr., pp. 73-74.)

In positive terms, the defendant Schuler alleges that in January, 1914, she made, executed, acknowledged and delivered to the defendant Hutchinson a grant, bargain and sale deed conveying to the said

Hutchinson all of the defendant Schuler's interest in said mining claims; that at the time she so conveyed her interest in said claims to the defendant Hutchinson, the said interest so conveyed stood upon the records of the County Recorder in and for the County of San Bernardino in the name of the defendant Schuler, and had so stood in her name for more than one year prior to the date of said transfer, without any cloud upon, or encumbrance against, said interest appearing upon the face of the said records; that prior to the execution of the said deed to defendant Hutchinson and after the making, signing and acknowledgment of the said deed to the said Shellito, the defendant Schuler stated all of the facts of the case to her attorney, one Ezra W. Decoto, Deputy District Attorney of the County of Alameda, State of California, and thereupon and after such statement of all the facts of the case by the defendant Schuler to the said Decoto, the said Decoto advised the defendant Schuler that she could legally and without liability or without breach of any duty owed by her to the said Shellito or to anyone else, make, execute, acknowledge and deliver the said deed to defendant Hutchinson; that thereafter, and in the presence of the said Decoto and acting upon his said advice, the defendant Schuler delivered the said deed to the said Hutchinson; that thereafter, and in the month of January, 1914, said deed was recorded by the said Hutchinson in the office of the County Recorder of the County of San Bernardino; that at no time prior to the execution and delivery of the said deed did the defendant Schuler

tell the defendant Hutchinson, nor did her said attorney tell the said Hutchinson, nor did either the defendant Schuler or her said attorney in any way inform the defendant Hutchinson that the defendant Schuler had made, signed and acknowledged the said deed to the said Shellito prior thereto and in December, 1913; that for and in consideration of the conveyance by the defendant Schuler to the defendant Hutchinson, the latter paid to the former a cash consideration; that defendant Schuler made and completed said sale in good faith, and without any intention to thereby defraud or injure any one whomsoever. With these allegations is coupled a denial, in positive terms, that the defendant Schuler made such conveyance to the defendant Hutchinson in pursuance of any combination and conspiracy between the defendants and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., pp. 74 to 80.)

The affidavit of the defendant Hutchinson covers substantially the same matter found in the affidavit of the defendant Schuler, from the point of view of the defendant Hutchinson. As to the alleged transfer from the defendant Schuler to Shellito prior to the transfer to the defendant Hutchinson, the latter alleges, in positive terms, his knowledge that the interest of the defendant Schuler stood upon the records in San Bernardino County, without encumbrance or cloud against it, in the name of the defendant Schuler; he also alleges, in positive terms, his lack of knowledge as to the existence of any deed of conveyance

signed and acknowledged prior to the transfer to him. He corroborates the defendant Schuler's allegations as to the payment of a cash consideration for said transfer. Coupled with this, he denies that he took the said conveyance from the said Schuler in pursuance of any combination or conspiracy between the defendants and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., pp. 50 to 53.)

The defendant Hutchinson, directing the allegations of his affidavit toward the matter in the bills hereinabove referred to in the Statement of the contents of the bills in paragraph 24 to 28 of said Statement, in positive terms, denies that the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, have, or any of them has, fraudulently, or in any other manner, attempted to procure the right of the defendant Pack in said mining claims for the purpose of using the said interest of the defendant Pack in such a way or manner as to destroy all of the rights of the complainant in said claims; denies that defendant Hutchinson has been acting as the agent, representative or attorney of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, in an endeavor to deprive and defraud the complainant of his right in said mining claims; denies that under the direction and orders of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, the defendant Hutchin-

son fraudulently obtained the said transfer from the defendant Schuler in pursuance of any combination and conspiracy between the defendants and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, to injure complainant, or to defraud or deprive him of his interest in said claims. (Tr., pp. 53 to 59.)

Upon the hearing of the motions, no counter-affidavits whatever were filed by the complainant. Thereafter, and after the hearing of said motion and argument thereon, the District Court denied said motion. (Tr., pp. 82-83, 84-85.)

Thereafter, and within the time allowed by Statute, the appellants herein took their said appeal from said order to this Honorable Court. (Tr., p. 88.)

SPECIFICATIONS OF ERROR.

Appellants urge as error the action of the District Court in giving, making and entering its order of December 21, 1914, by which the court denied appellants' motion for (1) an order vacating the order made on December 11, 1914, directing that an injunction *pendente lite* issue, and for (2) a further order dissolving the said injunction *pendente lite*. (Tr., pp. 86-87.)

Appellants urge that the error of the District Court is a fundamental one: that even if appellee's Bill, uncontroverted, had sufficient equity to merit injunctive relief, the affidavits filed on the motion to dissolve overcame that equity, and called for the vacation of

the order granting the injunction *pendente lite*, and the dissolution of the said injunction.

BRIEF.

Appellants' case rests upon the following propositions:

I.

An injunction *pendente lite* must be supported by verified statements, as to essential facts, positive, certain and free from conclusions.

Post vs. Beacon Vacuum Pump & Electrical Co. (Circuit Court of Appeals, 4th Circuit, January, 1898), 84 Fed. 371-373.

"A bill seeking a result which may be so disastrous to the interests of other stockholders as this might be if its principal prayer were granted, should support itself by decisive allegations. The general rule is that the essential part of a bill in equity should be stated positively and with precision. Story Eq. Pl. (10th Ed.) Sec. 255, 256. This is especially insisted on where a remedy is sought by an injunction or a rescission, the result of which may not only compensate the party injured, which is all the common law ordinarily gives, but may impair the interests of the adverse party to a vastly disproportionate extent. The underlying principle is stated in the following cases, although applied there from an aspect different from that at bar: *Grymes vs. Sanders*, 93 U. S. 55, 62; *U. S. vs. American Bell Tel. Co.*, 167 U. S. 224, 241. The common law gives relief on a mere preponderance of proof; but it is

certain that, in cases of the class we are considering, equity does not act unless the proofs are clear. The underlying reasons which require also that the allegations which the proofs are to sustain be clear to the effect that the complainant has suffered, or is threatened with, an injury so substantial as to demand, not only compensation, but also specific relief by rescission, even while this may cause a loss to others as to which his own would be comparatively trifling."

This Honorable Court, per Ross, Circuit Judge, has, in reversing an order granting an injunction *pendente lite*, affirmed the same doctrine in the case of *Anargyros & Company vs. Anargyros* (Circuit Court of Appeals, 9th Circuit, February, 1909), 167 Fed. 753, 769, in the following language:

"The well-established rule in equity is that a preliminary injunction should not be granted in a doubtful case."

In the case of *Gaines & Co. vs. Sroufe*, 117 Fed. (Circuit Court N. D. Cal., December, 1901), 965, 967, Circuit Judge Morrow said:

"It is the general rule that whatever is essential to the rights of the complainant, (where the ground for relief by injunction is fraud), and is necessarily within his knowledge, ought to be alleged positively and with precision."

Also see:

Henry Gas Co. vs. U. S., 191 Fed. 132, 136;
Owsley vs. Yerkes, 185 Fed. 686;

Hall Signal Co. vs. General Railway Signal Co., 153 Fed. 907, 908;
Star Co. vs. Culver Pub. House, 141 Fed. 129;
Paul Steam System vs. Paul, 129 Fed. 757, 760;
Shinkel vs. Louisville Co., 62 Fed. 690, 692;
Russell vs. Farley, 105 U. S. 433, 438;
 10 Enc. of Pl. & Pr., pp. 992-3;
 22 Cyc., pp. 953, 954;
Davitt vs. American Bakers Union, 124 Cal. 99, 101.

II.

Where a court's action in granting an injunction *pendente lite* is based upon a verified statement of facts a material one of which is not only uncertain, but is on information and belief, and not positive, such action rests upon an erroneous hypothesis of pertinent fact.

Anargyros & Co. vs. Anargyros, 167 Fed. (Circuit Court of Appeals, 9th Circuit, Gilbert, Ross and Morrow, Circuit Judges, per Ross, Circuit Judge, February, 1909), 753, 769.

This Honorable Court in reversing an order of the District Court granting an injunction *pendente lite*, says in the above-referred to case:

"Looking at the case as made by the pleadings and affidavits. we think the most that can be fairly claimed for the complainant is that it is a doubtful one. Under such circumstances the preliminary injunction should have been denied, and the temporary restraining order vacated."

Lakeshore & M. S. Ry. Co. et al. vs. Felton, 103 Fed. (Circuit Court of Appeals, 6th Circuit, Lurton, Day and Severens, Circuit Judges, per Severens, Circuit Judge, June, 1900), 227, 230.

"The answer, for the purposes of the motion for a preliminary injunction, may serve as an affidavit, and has only the same effect. The verification of the answer was by one of the solicitors, who made oath that 'the statements of the foregoing answer are true, as he verily believes.' There is no showing, however, that he had made such investigation of the facts as would enable him to speak with assurance, and his qualified statements rather imply that he had not, and there is no extrinsic showing of the contract. It seems to be settled that such a verification of the answer or of an affidavit is insufficient proof upon the hearing of a motion, either for an injunction, or to dissolve one already granted. Barb. Ch. Prac. 156; 2 High Inj. 1514, and the cases there cited; *Campbell vs. Morrison*, 7 Paige 157; *Miller vs. McDougall*, 44 Miss. 682; *Spalding vs. Keeley*. 7 Sim. 377."

Gaines & Co. vs. Sroufe, 117 Fed. (Circuit Court N. D. Cal., December, 1901, Morrow, C. J.), 965, 966:

"The allegations of the bill upon information and belief are insufficient. Whatever is essential to the rights of the complainant, and is necessarily within its knowledge, ought to be alleged positively."

Willis vs. Lauridson, 161 Cal. (1911), 106, 108:

"Before examining the complaint it may be well to state some established rules of law which must govern us in determining its sufficiency as a basis for the extraordinary remedy of injunction. Where the verified complaint is the basis for the relief sought, it takes the place of an affidavit and must be treated as such; and the facts so stated must stand the test to which oral testimony would be subjected. Averments which are but conclusions of law are not competent testimony, though they might stand as matter of pleading. Unless the statement, in the nature of a conclusion, is supported by the facts and circumstances on which it rests, it is insufficient to sustain an application for injunction."

In re United Wireless Telegraph Co., 201 Fed. (1912) 445, 449;

Murray Co. vs. Continental Gin Co., 126 Fed. (1903) 533, 534;

Leavenworth vs. Pepper, 32 Fed. (1887) 718, 719;

Chicago etc. Ry. Co. vs. New York etc. R. Co., 24 Fed. (1885) 516, 519;

Brooks vs. O'Hara, 8 Fed. (1881), 529, 532.

III.

Asserted equity in a verified bill, stated in terms sufficient to justify the affirmative use of the court's discretion on motion for injunction *pendente lite*, is overcome, on motion to dissolve such injunction, by affidavits supporting the motion which contain positive, clear, and unequivocal denials of material alle-

gations in the bill. Particularly is this true where material allegations in the bill are defective for want of positive averment, as well as for want of clearness, or because made up of the conclusions of the pleader.

Woodside vs. Tonopah & Goldfield Railroad Co., 184 Fed. (Circuit Court D. Nev., February, 1911, Morrow, C. J., Farrington, D. J., and Van Fleet, D. J., per Morrow, C. J.), 358, 359:

"The defendants have answered as they are required to do under the statute and have fully met and denied all of the equities of the complaint. The answers are specific and under oath. In equity practice this is usually deemed sufficient to dissolve a restraining order and prevent the issuance of an injunction *pendente lite*; that is to say, where the equities of the bill are denied fully and explicitly by a sufficient answer under oath, the court usually denies an injunction *pendente lite* for the reason that such an answer is deemed to overcome the equities of the bill."

City of Sacramento vs. Southern Pacific Co., 155 Fed. (Circuit Court, N. D. Cal., September, 1907, per Van Fleet, D. J.), 1022:

"An attentive examination of the pleadings and the affidavits used at the hearing, in the light of the very full and thorough presentation of the matter by counsel for both sides, discloses no fact to take the case out of the general and well-settled rule that when, as here, the sworn answer fully and positively, in unequivocal terms, denies all the material allegations of the bill on which

the complainant's asserted equity rests, a preliminary injunction will be denied, or, if previously granted, will be dissolved. High on Injunctions, Sections 698, 1505; *Home Insurance Co. vs. Nobles* (Circuit Court), 63 Fed. 642; *St. Louis K. C. & C. Ry. Co. vs. Dewees* (Circuit Court), 23 Fed. 691."

Edison Electric Light Co. vs. Buckeye Co., 59 Fed. 691, 701;

Carey vs. Domestic Spring Bed Co., 26 Fed. 38, 39.

IV.

Where asserted equity in a bill is wholly overcome by contradictory affidavits on motion to dissolve an injunction, it is an improvident exercise of a court's legal discretion to deny dissolution.

Woodside vs. Tonopah & Goldfield Railroad Co., 184 Fed. 358, 359;

Anargyros & Co. vs. Anargyros, 167 Fed. 753, 769;

City of Sacramento vs. So. Pacific Co., 155 Fed. 1022;

Home Insurance Co. vs. Nobles, 63 Fed. 642;

Edison Electric Light Co. vs. Buckeye Co., 59 Fed. 691, 701.

V.

There has been reversible error where a court in granting or continuing an injunction *pendente lite*—

(a) Has relied upon an erroneous hypothesis of pertinent fact, or—

(b) Has relied upon an erroneous hypothesis of pertinent law, or—

(c) Has improvidently exercised its legal discretion.

Acme Appliance Co. vs. Commercial etc. Co.,
192 Fed. 321, 323;

Henry Gas Co. vs. U. S., 191 Fed. 132, 136;

St. Louis Street etc. Co. vs. Sanitary etc. Co.,
161 Fed. 725;

Alaska Pac. etc. Co. vs. Copper etc. Co., 160
Fed. 862, 865.

ARGUMENT.

Logical sequence is so markedly absent from the allegations of fact in the bills of complaint, that the application of some painstaking analysis is requisite to an intelligent grasp of the theories which the complainant and appellee apparently had in mind as warranting the exercise of special equitable functions.

Upon such analysis it appears that the theories embodied in the bills of complaint can be placed under one of two principal heads.

Under the first head come the theories where the complainant seeks injunctive relief because of alleged defects in the methods in which the defendants and appellants have pursued the forfeiture proceedings instituted by them.

Under the second, and more important, head may be grouped the appellee's theories that this case merits injunctive relief because the defendants and appellants have never had any actual right to institute the for-

feiture proceedings inveighed against; and for the defendants to assert such right is for them to be guilty of fraud.

Discussion of the theories grouped under the second head, because more important, warrants first attention.

Theories Based on Absence of Right.

Appellee in his bills of complaint has essayed to allege six reasons which he believes warrant his conclusion that the defendants and appellants have no right to demand contribution from complainant and appellee, and, in the absence of contribution, to declare a forfeiture. These reasons may be summarized as follows:

1. Because the defendant and appellant Pack, who was the complainant's co-owner claiming to have expended the money, contribution of complainant's portion of which is sought, in fact did not spend the \$1200 named in the Notice of Forfeiture, or, if he did spend it, did not spend it in the performance of proper annual assessment work. The allegations in the support of this theory will be found in greater particularity hereinabove in the foregoing statement of the contents of the bills in Paragraphs 5, 6, 10 and 30 thereof (Tr., pp. 5, 6-7, 13), as to the non-expenditure of said money, and in Paragraphs 10, 32 and 33 (Tr., pp. 7, 13), as to the improper expenditure of said moneys.

2. Because certain money, to wit, \$2836, alleged to have been contributed, on behalf of complainant and

his co-locators including the defendant Pack, to Pack to be by him used in the performance of said assessment work, has not been credited to complainant in the forfeiture proceedings that have been instituted against him. Reference is hereby made for the details of the allegations supporting this theory to Paragraphs 74 and 75 of the foregoing statement of the contents of the bills as to \$1000 of said \$2836 (Tr., pp. 22-23), and to Paragraphs 76, 77, 78, 79, 80 and 81 of said statement (Tr., pp. 23-24), as to the balance of \$1836.

3. Because of the existence of an alleged combination and conspiracy between the defendants and appellants, on the one side, and the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, on the other side, to injure complainant and to defraud and deprive him of his interest in said mining claims, and to defeat the locations of complainant and his co-locators, including the defendant Pack. So nebulous and so confusing are the allegations of the bill in support of this theory, that it is necessary, for greater detail to look to a large number of the paragraphs in the foregoing statement of the contents of the bills, namely: as to the fact that the defendant Hutchinson took the conveyance from the defendant Schuler for the sole use and benefit of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, Paragraphs 16, 17, 19, 20 and 21 (Tr., pp. 8-12); as to the fact that the Foreign Mines and Development Company, the

American Trona Company and the California Trona Company claim rights and interest in the mineral land covered by the placer locations made and recorded by complainant and his co-locators, including the defendant Pack, Paragraph 22 (Tr., pp. 10-11); as to the fact that the Foreign Mines and Development Company, American Trona Company and California Trona Company have for some years last past been endeavoring to defeat the locations so made by complainant and his co-locators, including the defendant Pack, Paragraph 23 (Tr., p. 11); as to the fact that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company have fraudulently attempted to procure defendant Pack's right in said claims for the purpose of using said interest to destroy complainant's right and to defraud complainant out of his interest in said claims, Paragraph 24 (Tr., pp. 11-12); as to the fact that the defendant Hutchinson has been acting as the agent, representative and attorney of said Foreign Mines and Development Company, American Trona Company and the California Trona Company in endeavoring to deprive and defraud complainant of his right in said locations, Paragraph 25 (Tr., p. 11); as to the fact that defendant Hutchinson, under the direction and orders of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, fraudulently obtained said transfer from the defendant Schuler in pursuance to the combination and conspiracy referred to, Paragraphs 26 and 28 (Tr., pp. 11-12); as to the

fact that pursuant to said combination and conspiracy the defendants caused to be prepared and served on complainant the Notice of Forfeiture complained of, Paragraphs 27, 28 and 29 (Tr., p. 12).

4. Because the defendant Pack's one-eighth interest in the mining claims as successors to which the defendants Schuler and Hutchinson appear, was no longer, at the time of the institution of the forfeiture proceedings, in any of the defendants, for the reason that (a) defendant Schuler had conveyed to one Shellito prior to her conveyance to defendant Hutchinson, who took with notice of defendant Schuler's conveyance to Shellito, or (b) for the reason that the conveyance from the defendant Schuler to the defendant Hutchinson was without consideration. Reference is made for further details as to the allegation that defendant Hutchinson had notice at the time he took the conveyance from the defendant Schuler, of the defendant Schuler's prior transfer to Shellito, to paragraphs 13, 14 and 15 (Tr., p. 8); as to the fact that the transfer from the defendant Schuler to defendant Hutchinson was without consideration, to Paragraph 18 (Tr., pp. 9-10).

5. Because the sums for which contribution is claimed from the complainant by the defendant Pack are made up of sums for which certain judgments have been rendered against the defendant Pack and others, which said judgments remain unpaid. Reference is made for further particulars as to these allegations to Paragraphs 34 to 73, both inclusive (Tr., pp. 14-22), of the statement of the contents of the bills

hereinbefore found, and particularly to Paragraphs 38, 46, 58, 68 and 72.

6. Because the sums for which contribution is claimed from the complainant by the defendant Pack are part of a sum of \$5600 for which the defendant Pack claims contribution from the complainant in a forfeiture proceeding entirely separate and distinct from the one referred to in the bill. Reference as to details of the allegations supporting this theory is hereby made to Paragraphs 82 and 83 (Tr., p. 24) of the foregoing statement of the contents of the bills of complaint.

THEORIES RELIED UPON BY THE COURT TO SUPPORT ITS ORDER GRANTING IN- JUNCTION.

Reference to the opinion filed by the Court at the time of making its order granting the injunction *pendente lite* (Tr., pp. 40-44) discloses the fact (Tr., p. 42) that the Court considered theories hereinabove in this brief enumerated as 1 and 2, as determinative of complainant's right to injunctive relief.

While the opinion more particularly considers the bill of complaint on file in the case relating to 175 claims, in which case no motion to dissolve the injunction *pendente lite* was made, and in which, therefore, an appeal (Case No. 2535) has been taken only from the order granting the injunction *pendente lite*, the attitude of the Court therein expressed as to the matters specifically under discussion is of equal

application to both the present case, No. 2539, and to Case No. 2540.

The Court says (Tr., p. 42): "Plaintiff then alleges that the said Pack did not expend or cause to be expended of his own money, during the years 1911 and 1912, or at any other time, the sum of \$5600, of which the said \$700 was the one-eighth part, upon or for the benefit of said placer mining claims, or at all; that at least \$2836 was contributed by plaintiff and his co-locators to the defendant Pack for the purpose of doing the assessment work upon the claims mentioned, for the years 1911 and 1912."

Non-Expenditure of Money.

The only allegations in the bill upon which the opinion of the Court in the first of these respects (*i. e.*, alleged non-expenditure of money) can rest, are found in the foregoing statement of the contents of the bills in paragraphs 5, 6, 10 and 30 thereof. (Tr., pp. 5, 7 and 13.) The first of these allegations is, it is true, positive in its terms, but it is coupled with an important qualification: That Pack did not spend \$1200 "of his own money or funds" (Tr., p. 5). Well separated from this allegation by averments entirely immaterial to this theory is found a subsequent allegation, in paragraph 30 (Tr., p. 13), upon information and belief "that the said Pack never, during the year 1911, or at any other time, expended * * * the sum of \$1200 of his own funds or money, or any other sum or amount, in and upon said claims * * * or any of them, for any purpose whatsoever."

Confusion as to just what the person verifying the bill does know to be true may well arise from the different methods of treating two so similar averments. Nor does it simplify the dilemma to find in paragraph 10 (Tr., p. 7) an allegation upon information and belief "that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims * * * for the year 1911, expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said mining claims are located, and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported * * * for the purpose of performing said representation work during said year upon said claims."

Surely a positive assertion that defendant Pack did not spend his own funds is in no wise inconsistent with the fact that the said defendant Pack spent funds loaned to him or advanced to him, or on his behalf, by other persons. If the money was spent by Pack, so far as this complainant is concerned, he cannot take exception to a demand by Pack for contribution for such expenditure. If *no money whatever* was spent by Pack why does the complainant, who seeks the aid of equity to deprive Pack or at least to delay him in the assertion of a substantial right (*Badger etc. Co. v. Stockton Co.*, 139 Fed. 838, 842), not bring forth a verified statement in proof thereof? This omission might be laid upon the head of a

careless pleader, were it not for the added doubt occasioned by the second line of attack, which presupposes the expenditure by Pack of the funds, but assails it as not properly made. Such verified statements present the testimony of one whose inaccuracy arouses suspicion as to his motives rather than sympathy for him as a slovenly pleader.

Another feature calling for a most careful scrutiny is the verification attached to the bills of complaint, taken in connection with the above-referred to statements, one positive, and one on information and belief as to the same matter. The affiant Lee in the verification takes oath (Tr., p. 29) that "he has personal knowledge of all the facts and matters therein (in the complaint) alleged, and knows them to be true, except as to those matters therein alleged upon information and belief, and as to them, he believes them to be true." Such an affiant, face to face with conclusive proof that the defendant Pack had in truth spent \$1200 of his own funds upon the claims, could find escape from his embarrassment in the similarity of the averment apparently positive to the one upon information and belief. According to his verification he only believes to be true the matter alleged upon information and belief. If certain matter occurs in the complaint upon information and belief he has but given to the court his testimony as to what his belief is as to that matter. And that same matter, regardless of the number of times it may appear in the complaint, or in how many forms, is only testimony as to belief. It is not as though an affiant had said in so many

words "I positively swear that Pack did not spend any money of his own"; and had then said, "Upon information and belief I swear that Pack did not spend any money at all." In the present inquiry there appears "On information and belief I swear that defendant Pack did not spend any of his own money or any money at all." In other parts of the bills the same matter recurs without, it is true, having before it the statement that it is on information and belief, but at the same time without having before it the statement that it is meant to be positively asserted as the personal knowledge of the affiant.

It is to guard against just such evasions and equivocations that there are these equity rules:

That bills must show candor and frankness.

Moffat vs. County Commissioners, 97 Md. 266, 270; 54 At. 960, 962;

Lamm vs. Burrell, 69 Md. 272, 274-6; 14 At. 682, 683-4;

McDowell vs. Biddison, 120 Md. 118, 125; 87 At. 752, 755;

Blackwell's Durham Tobacco Co. vs. American Tobacco Co., 145 N. C. 367, 369; 59 S. E. 123, 128.

That where there are contradictory or inconsistent allegations the equity will be tested by the weaker rather than by the stronger allegation.

Godwin vs. Phifer, 51 Fla. 441, 454; 41 So. 597, 601;

Camp vs. Matheson, 30 Ga. 170.

That allegations must not be argumentative.

Mead vs. Stirling, 62 Conn. 586, 596;
Battle vs. Stephens, 32 Ga. 25;
Stinson vs. Ellicott City etc. Co., 109 Md. 111,
 116; 71 At. 527, 529;
 1 High on Injunction (4th ed.) § 34.

And paramount to these rules, both because of the dignity of the courts in which it prevails, and because of its long and well-defined existence, is the rule that "such a verification (on information and belief)
 * * * of an affidavit is insufficient proof upon the hearing of a motion either for an injunction or to dissolve one already granted."

Lake Shore and M. S. Ry. Co. vs. Felton (Circuit Court of Appeals, 6th Circuit, June, 1900, Lurton, Day and Severens, C. J., per Severens, C. J.), 103 Fed. 227, 230;
In re United Wireless Telegraph Co., 201 Fed. (1912) 445, 449;
Murray Co. vs. Continental Gin Co., 126 Fed. (1903) 533, 534;
Leavenworth vs. Pepper, 32 Fed. (1887) 718, 719;
Chicago etc. Ry. Co. vs. New York etc. R. Co., 24 Fed. (1885) 516, 519;
Brooks vs. O'Hara, 8 Fed. (1881) 529, 532.

Failure to Credit Complainant's Advances.

The sum of \$2836 referred to in the Court's opinion as having been contributed by complainant and his co-locators to the defendant Pack, and for which Pack has failed to credit complainant, is made up of two sums. One of these is \$1836; the other \$1000.

(See Paragraphs 74 to 81, statement of contents of bills; Tr., pp. 22-24.)

The form in which the complainant has presented his proof of the payment of the \$1836 is hardly calculated to inspire boundless trust in the artless candor of the pleader; nor can it fail to arouse the keenest admiration at what now appears, not as familiarity with the books on pleading, but as a refinement of crafty legerdemain. By this magic the pleader would transmute before the eyes of the unwary and the credulous the dross of the evidentiary fact: a mere written evidence of indebtedness, into the more substantial metal of ultimate fact: a *bona fide* debt due, owing and, it is to be inferred, unpaid from the defendant Pack to complainant and his co-locators.

The pleader says: Prior to December, 1911, the defendant Pack "duly acknowledged in writing that he was indebted to one Henry E. Lee (the same Lee who verified complainant's bill [Tr. p. 67]), the duly authorized agent of plaintiff and his co-locators". The pleader does not say that the defendant Pack was indebted to Lee, and that the indebtedness was at that time due, owing and unpaid. Most assuredly had this been the case Affiant Lee might well have set forth the ultimate fact concerning Creditor Lee. Had this been done, more substance would have been lent to the allegation following, that "said Lee, acting as such agent for plaintiff and his co-locators, directed the said defendant Pack to use and utilize all of *said money*, or so much thereof as might be necessary, in the annual representation of the placer mining claims

* * * for the years 1911 and 1912, and that the said defendant Pack agreed with the said Lee that he would so utilize and use *said money*". To what does "*said money*" refer? Certainly its existence as "*said money*" sprang from the written acknowledgment of indebtedness, and from nothing more. Nor is the doubt as to the parentage of "*said money*" dispelled in the subsequent averment that "*said money and indebtedness was money due and owing to this plaintiff and his co-locators from the said defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to the said Lee, the duly authorized agent of this plaintiff and his co-locators*". Such care! Such clearness! How circumspectly Affiant Lee sets forth the acts of Agent Lee and the acts of Creditor Lee!

The balance of the sums said to have been contributed by complainant and his co-locators to the defendant Pack is named as \$1,000 (see paragraphs 74 and 75 of the statement of the contents of the bills; Tr., p. 22). The allegation of the bills as to the fact of the payment of this sum is definite and clear. Its form throws into vivid relief the inadequacy of the allegations concerning the alleged payment of the \$1,836. For once Affiant Lee states in so many words that Agent Lee, "as the duly authorized agent and representative of this plaintiff, and of his co-locators, paid to the said defendant Thos. W. Pack, for this plaintiff, and for his said co-locators, in their respective proportionate shares, the sum of \$1,000, as a portion of their pro rata contribution, for the do-

ing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said actual assessment work thereon". But from this point on there is a lapse again into the realm of the obscure. Says Affiant Lee: "That as plaintiff is informed and believes, the said Thos. W. Pack did so use the said sum of \$1,000 for said purpose in said year."

If the fatally defective form of such an averment ("The correct form of averment is that set forth in Story, Eq. Pl. (8th Ed.), p. 249, viz.: 'That plaintiff has been informed and believes, and therefore avers'": *Wyckoff vs. Wagner Typewriter Co.*, 88 Fed. 515, 517; *Murray Co. vs. Continental Gin Co.*, 126 Fed. 533, 534), does not open the allegation to destructive criticism, the conspicuous absence of any averment that the defendant Pack has not properly credited to complainant and his co-locators the \$1,000 paid him, renders the relevancy and therefore the potency of the averment as to the payment, of little value.

Conclusions as to the Theory of Failure to Credit.

Even if, for the sake of argument, fullest credit be given to all the complainant's allegations in support of the theory of failure to credit, it is, with the greatest deference, difficult to see how such averments warrant the conclusion that an injunction should issue. Admit that \$2836 had been actually paid to the defendant Pack. By the terms of the bill it was paid to him on behalf of complainant and his co-

locators, who include the defendant Pack himself. The payment of such a sum would amount to a contribution on the part of each of eight locators, including the defendant Pack, of \$354.50. By the terms of the bill the contribution was made for the performance of assessment work for 1911 and 1912. In case No. 2539 it appears that the defendant Pack claims to have expended \$1200 or \$150 for each locator, and in case No. 2540, \$4400, or \$550 for each locator. Case No. 2539 applies to the work for 1911; case No. 2540 applies to the work for 1912. It therefore appears that the defendant Pack claims to have expended \$700 for each locator for both 1911 and 1912; \$150 for 1911 and \$550 for 1912. As against this sum the complainant has, at best, made out a contribution of \$354.50, on the part of each locator, for both 1911 and 1912, or a difference in defendant Pack's favor of \$345.50. It cannot be denied that the defendant Pack has the right to pursue forfeiture proceedings and by them enforce the payment by his co-locators at least of this sum, or, upon their default, to acquire their interests thereby. Even assuming that a court of equity would be warranted in restraining the completion of forfeiture proceedings under such circumstances where the amount as to which the co-locator is delinquent is actually paid into court, no such payment has been made in the present cases. Furthermore, there are no facts alleged by the complainant to show in what proportion the amount said to have been contributed by the complainant and his co-locators was to be applied to 1911 and to 1912.

Interference With Performance of Assessment Work.

The Court's opinion, as has been noted, was filed in case No. 2535, in which the bill of complaint attacked the forfeiture proceedings as to 175 claims. In that bill alone occurs the allegation upon which the following portion of the Court's opinion rests: "It is also alleged that in the year 1912, while plaintiff and his co-locators were engaged in the performance of the annual assessment work upon said claims, they were forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company." (Tr. p. 43.) While it may be necessary, therefore, to consider these allegations with reference to the bill relating to the 175 claims, they are not before the Court in this case: No. 2539, or case No. 2540.

The Theories of Non-Expenditure and Failure to Credit in the Light of Defendants' Affidavits.

The discussion has thus far been directed toward the bills in the aspect in which they appear, uncontroverted. Upon the motion to dissolve the injunctions *pendente lite*, affidavits of the defendant Hutchinson (Tr. fols. pp. 49-60), of the defendant Pack (Tr. pp. 60-71), and of the defendant Schuler (Tr. pp. 71-81), were filed. The light in which the contents of these affidavits places the complainant's bills calls into operation principles of equity inapplicable up to this time in the course of the proceedings.

Containing, as these affidavits do, denials in the most positive terms of all allegations in the bills essential to injunctive relief, it is urged that such equity as the bills, standing alone, may have had, is wholly overcome. This effect is urged with particular force because of the evasive, confusing and indefinite form of the bills, and the probably intentional absence therein of adequate verification of pertinent facts.

The affidavit of the defendant Pack bears pointedly upon the hereinabove referred to theories of non-expenditure and failure to credit. As to the complainant's questionable assertions that the defendant Pack did not expend \$1200 in 1911 and \$4400 in 1912, he has positive and clear-cut denials (Tr. pp. 61 and 62), coupled with affirmative allegations, in positive terms, that he did spend the sums claimed by him in his Notice of Forfeiture to have been so spent. The directness with which the defendant Pack meets this issue has particular weight and force in meeting and disposing of the feeble assertions of the complainant.

In dealing with the contribution of \$2836 alleged to have been made on behalf of the complainant, the defendant Pack in his affidavit has an equally positive denial that he ever owed complainant and his co-locators any money whatever (Tr. pp. 60-62, 67-69), or that he ever owed Henry E. Lee any money whatever, in any capacity whatever (Tr. pp. 67-69), or that he has ever received any money whatever from the said Lee as the agent of the complainant and his co-locators (Tr. pp. 67-69). The defendant

Pack admits that he received \$1000 from Henry E. Lee, the same person who verified the bill of complaint, on January 18th, 1912, but denies positively that said \$1000 was paid to him to be applied toward the assessment work for the year 1911 on the 12 claims involved in case No. 2539, or that said sum, or any part of it, was applied toward said work for said year on said claims (Tr. pp. 67-69).¹

The distrust with which complainant's allegations as to the \$1836 should be viewed is well shown by the explanatory matter with reference thereto found in defendant Pack's affidavit. (Tr., pp. 67-70.) First, there are denials, positive in terms, that Pack was indebted to Lee, in any capacity whatsoever, in any sum whatsoever; that said Lee in any capacity whatsoever directed Pack to use and utilize \$1836 in the annual representation of the mining claims for any year; that Pack agreed with said Lee that Pack would so utilize or use said money; that said sum is, and should be, a portion of the money claimed by Pack, in his Notice of Forfeiture, to have been expended by him

¹In case No. 2540 the affidavit of the defendant Pack contains the same denials as those just referred to with the exception of the denial that the money was expended in the performance of assessment work for the year 1911 on said claims. The reason is apparent: Case No. 2540 applies to 44 claims, on which it is alleged that \$4400 was expended by the defendant Pack in 1912 for that year. As to the receipt of the \$1,000 from Lee, defendant Pack's affidavit avers positively: Such receipt on or about January 18th, 1912; the indebtedness of Lee to Pack at that time in a sum in excess of \$1,000; the election of Pack to treat said payment as a payment on account of said indebtedness of Lee to said Pack; that he does now elect to so treat said payment; and that the \$1,000 was not advanced for or on behalf of complainant and his co-locators, or any, or either of them. (Tr., p. 71 and 72.)

(Tr., pp. 67 and 68); that the money and indebtedness, or money, or indebtedness, was money due and owing, or due, or owing to complainant and his co-locators, or to complainant, or his co-locators; that said money should be credited to complainant and his co-locators in proportion to their respective interests; and that Pack had, at any time whatsoever, owed to Lee and complainant and his co-locators, or any of them, any sum whatsoever. (Tr., pp. 68 and 69.)

Following the denials are affirmative allegations, in positive terms: That prior to December, 1911, said Lee was indebted to Pack in a large sum, that Lee applied to him for a loan, stating to Pack that if he would assist Lee to obtain a loan the latter would repay to Pack the amount in which Lee then stood indebted to Pack; that upon Lee's request for an accommodation endorsement upon Lee's promissory note, Pack refused, whereupon Lee requested that Pack give Lee a written acknowledgment of indebtedness from Pack to Lee in order that the latter might obtain a loan on his promissory note secured by an assignment of said written acknowledgment; that Pack complied with Lee's request, and gave him a written acknowledgment in the form of an I. O. U. in the sum of \$1836; that Pack received no consideration for said written acknowledgment, either past or present; that said Lee was unable to procure a loan on the security of said I. O. U.; that the same has never been negotiated, and is wholly without consideration of any kind whatsoever or at all; and that said Lee is now, and for a long time has been, in-

debted to Pack in excess of \$2,000, which said sum is now wholly due and owing from said Lee and unpaid. (Tr., pp. 68-70.)

There are appropriate, complete and positive denials, not only in the defendant Pack's affidavit, but also in those of the defendants Schuler and Hutchinson, as to the existence of any combination and conspiracy, or the performance of any act pursuant to any combination and conspiracy, between the defendants, on the one side, and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, on the other side, or any one else. (Tr., pp. 51-59, 62-68 and 77-80.)

Where a minute examination and the straining of easily followed rules of pleading are necessary to piece together from the disjointed allegations of complainant's bills enough facts to show, at best, an impeachable equity in the complainant, the situation must, indeed, be strange, if pointed and positive denials of this equity do not demolish it.

Other Theories.

By dint of a careful combing of the bills of complaint and a rearrangement of the allegations therein, it is possible to discern four additional theories which have as their basis the proposition that the defendants never have had any right to institute forfeiture proceedings. The District Court does not touch upon these in its opinion. Doubtless they have been ignored because of their patent insufficiency. They will, therefore, be passed upon most briefly here.

There may be mentioned the allegations as to the existence of an alleged combination and conspiracy between the defendants, on the one side, and the Foreign Mines Development Company, the American Trona Company, and the California Trona Company, on the other side, to injure complainant and to defraud and deprive him of his interest in said mining claims. It is difficult to point to any precise allegation as to the existence of such a combination and conspiracy. There are, however, certain acts alleged to have been done by one or more of the defendants pursuant to such a combination and conspiracy, which we may assume, for the sake of argument, to have been alleged in these general terms to exist. The allegations as to these various acts recur at such frequent intervals in the bill as to become a monotonous formula. In each of them the portentous words, "combination and conspiracy" stand alone, without the support of particulars.

There occurs, following the allegations that the defendant Schuler had conveyed the interest in the claims which she derived from the defendant Pack to one Shellito prior to her transfer to the defendant Hutchinson, and that the defendant Hutchinson took from the defendant Schuler with knowledge of her prior transfer, the statement that the defendant Hutchinson took the conveyance in pursuance of a combination and conspiracy. (Tr., p. 10.) Immediately following this we find the same matter repeated upon information and belief. (Tr., p. 11.)

There occurs the allegation, mentioned in the Dis-

strict Court's opinion, that the defendant Hutchinson, if he acquired any title at all from the defendant Schuler, holds the same for the benefit of the Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them. (Tr., p. 10.) The paragraph in which this allegation is found commences with the statement that "The plaintiff further alleges that upon his information and belief." It is therefore matter of doubt as to whether or not the allegation itself, following in the same paragraph, is not also meant to be upon information and belief.

There occurs an allegation, in entire keeping with the clearness of the complainant's other allegations, that the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company "claim rights and interests in and to the mineral lands covered by said placer locations" (it does not appear whether or not these interests are claimed adversely to the complainant and his co-locators), and for some years last past have been endeavoring to defeat the complainant's locations. (Tr., pp. 10-11.)

Following this the pleader has departed from his rule of leaving one in doubt as to the sufficiency of his allegation. He has inserted an averment, beyond argument fatally defective, that "the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have * * * as plaintiff is informed and believes, fraudulently attempted to procure the right, title and

interest of defendant Pack in * * * said locations
 * * * for the express purpose * * * of using
 the said interest * * * in such a way * * *
 as to destroy all of plaintiff's right therein, and to
 defraud plaintiff out of all interest in * * * said
 claims." (Tr., pp. 10-11.)

From what is indisputably insufficient, there is immediate return, in that plaintiff "further alleges on like information and belief," to the safer paths of uncertainty. This allegation concerns the fact that defendant Hutchinson has been acting as the agent of the three above-named companies in endeavoring to deprive and defraud plaintiff of his rights in said mining locations. (Tr., p. 11.)

Following this there occur, each with an appendix stating that the act was done in pursuance of the combination and conspiracy heretofore referred to, allegations of the following acts: That the defendant Hutchinson, under the direction and orders of the three companies, fraudulently obtained transfer from the defendant Schuler; and that the three defendants caused the Notice of Forfeiture to be served. This matter is laboriously repeated, as though the proper pleading of a combination and conspiracy depended upon the number of times the words appear within a given space. (Tr., pp. 11-12.) Some of the strength of this argument, however, seems to have been taken from it by the fact that one of the repetitions is upon information and belief. (Tr., p. 13.)

Following this, seven pages (Fol. pp. 14 to 22) are devoted by the complainant to the histories of

five actions pending in the Superior Court of the State of California, in which the defendant Hutchinson appears as attorney for plaintiff in each case. It further appears that in two of these actions defendant Pack figured as a defendant, and in the other three the defendant Schuler. By paraphrasing the allegations of the complaints in these various actions, the complainant seeks to make it appear that the claim upon which each one of them was founded was for either goods or services furnished to Pack in the performance of annual assessment work upon the mining claims in dispute. It is alleged that judgments have been obtained in some of these actions which are still unpaid, and that the amounts of these judgments and the amounts involved in others of the actions constitute part of the amounts claimed by the defendant Pack in his Notice of Forfeiture to have been expended by him. This latter allegation, in each instance, is based upon information and belief.

So much for the additional theories of this class to be discovered in the bills, as they stand alone. With the exception of the allegation that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company claim an interest in the mineral locations and the allegation that defendant Hutchinson holds the interest which he obtained from the defendant Schuler for the use and benefit of the three companies or all or part of them, every one of these assertions is flatly contradicted by either one of the defendants or all of them in their affidavits.

With respect to the theories discernible in the bill and based upon the proposition that the methods pursued by the defendant in prosecuting their forfeiture proceedings are defective, little need be said. They all turn upon a fancied need for equitable interposition to prevent the use of notices of forfeiture defective upon their face, to cloud complainant's title. The mere statement of such a theory is sufficient to destroy it. No cloud can be cast upon title by an instrument or proceeding that is defective upon its face. The allegations in this connection are found in Transcript, pages 6, 7, 25.

Aspect of the Situation Upon Appeal.

The eyes of an appellate court reviewing the action of a district court in granting an injunction *pendente lite* and in refusing to dissolve the same, are directed upon two inquiries: first, has the District Court "proceeded upon an erroneous hypothesis of pertinent fact or law?" Second, has the District Court "improvidently exercised its legal discretion?"

Acme Appliance Co. v. Commercial etc. Co.,
(Circuit Court of Appeals, 6th Circuit), 192
Fed. (December, 1911), 321, 323.

In the pursuit of the first of these inquiries there come before the Appellate Court the bills in these cases as they stand alone, their material allegations uncontroverted. Unless it can be said, after examination of these bills, that the hypothesis of pertinent fact which the District Court erected as the structure

to support its injunctions is without material flaw, the action of the lower court should be reversed.

It has been pointed out wherein the bills as a whole are woefully deficient in logical theory upon which they proceed. Still more deficient, because of its incompetency, is the evidence brought forward in support of each theory.

To support each theory, testimony, in the form of positive verified statements of fact, is necessary. In no single one of the theories advanced by the complainant, is every fact material to such theory upheld by such testimony. If these premises are correct, the conclusion cannot but follow that any judicial action which rests upon any one of these theories rests upon an erroneous hypothesis of pertinent fact. This conclusion once properly reached calls into action in these cases the corrective authority of the Appellate Court.

The case in the aspect of one resting solely upon the bill of complaint, uncontroverted, seems to present so clear and fundamental an error that reversal should follow. To go further and to consider the effect upon so weak a hypothesis of fact of the positive contradictory proof presented by the defendants, serves to magnify the insufficiency of the record as a foundation for the continuance of an injunction. Admit, if need be, that there is certain equity to be found in the bill. At best, it is a tenuous and uncertain equity. Such weak supports as those upon which it rests would be demolished upon much less positive and comprehensive denials than those made by these

defendants. After such destruction of the equity, the injunction placed upon it must needs fall with it. In such a situation the action of the Court in refusing to dissolve the injunction and in continuing it, as has been done in these cases, falls under the eye of this Appellate Court as an error of the second form: improvident exercise of the lower court's discretion.

Where there is a two-fold weakness such as the present record discloses the appellate courts are quick to remedy the wrong done defendants by the injunctive burdens placed upon them.

In the case of *St. Louis Street Flushing Machine Co. v. Sanitary Street Flushing Machine Co.*, (Circuit Court of Appeals, 8th Circuit, April, 1908), 161 Fed. 725, the same dual weakness as appears in the present record was presented to the Appellate Court. The case was one which came before the Appellate Court on appeal from an order granting a preliminary injunction. An injunction had issued upon a bill showing an infringement of complainant's patent. The Appellate Court at some length first discusses the improvident exercise in the issuance of the injunction of the District Court's legal discretion, upon the situation as presented by the entire record. It then goes on to say (p. 728):

"For another reason, also, the preliminary injunction ought not to have been granted. It is a fundamental principle that injunctions ought not to issue unless the right alleged to be invaded or threatened is clear. As said in *Truly vs. Wanzer*, 5 How. 141, 12 L. Ed. 88, 'There is no power the exercise of which is more deli-

cate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protecting, preventive process of injunction.' The affidavits in support of and against the motion for injunction leave the existence of the verbal license relied on by complainant in grave doubt and uncertainty, too doubtful and uncertain, at least, to warrant interference with the *status quo*, until the right can be deliberately ascertained and declared at final hearing.

"The order awarding the preliminary injunction was improvidently made. It must therefore be reversed and the cause remanded, with direction to deny the motion. It is so ordered."

Again, in *Henry Gas Co. v. United States*, (October, 1911), the Circuit Court of Appeals in the 8th Circuit (191 Fed. 132, 136), in considering an appeal from an order granting an interlocutory injunction, on which appeal the order was reversed, said:

"Upon these facts the Circuit Court granted a preliminary injunction against the defendant as prayed in the bill; and the sole question for determination is, was it rightly granted?"

"The granting of or refusal to grant a preliminary injunction rests in the sound judicial discretion of the court; but it is a cardinal principle of equity jurisprudence that it will not be granted unless the right to it is clear, the injury impending, and threatened so as to be averted only by the preventive process of injunction (*Truly v. Wanzer*, 5 How. 141, 142, 12 L. Ed.

88; *St. Louis Street Flushing Machine Co. v. Sanitary Flushing Machine Co.*, 161 Fed. 725-728), or the case is such that the *status quo* should be maintained until the final hearing. (*City of Newton v. Levis*, 79 Fed. 715-718; *Denver and R. G. R. R. Co. v. United States*, 124 Fed. 157-161.)”

This Honorable Court, per Gilbert, Circuit Judge, has expressed its view as to the effect on appeal of the disregard by the lower court of the facts or of the principles of equity applicable to the case, in the following language:

Alaska Pacific Ry. & Terminal Co. v. Copper River and N. W. Ry. Co., (9th Circuit, 1908), 160 Fed. 862-865.

“The office of a preliminary injunction is to preserve the subject of the controversy in its present condition, in order to prevent the perpetration of a wrong or the doing of an act whereby the subject of the controversy may be materially injured or endangered, until a full investigation of the case may be had. ‘A preliminary injunction will never be granted unless from the pressure of an urgent necessity. The damage threatened, and which it is legitimate to prevent, during the pendency of the suit, must be, in an equitable point of view, of an irreparable character.’ (16 Am. & Eng. Enc. of Law, 345.) And the rule is well settled that the granting or withholding of an injunction *pendente lite* ordinarily rests in the sound discretion of the court to which the application is made, and that the ruling thereon is not subject to reversal in an appellate court, *unless there has been abuse of discretion evidenced by a disregard of the facts or of the principles of equity applicable to the case.* *Vogel v. Warsing*, 146 Fed. 949, and cases there cited.”

Upon the point that the equity of the bill has been overcome by the denial in the defendants' affidavits, the language of Morrow, Circuit Judge, in the case of *Woodside v. Tonopah & Goldfield Railroad Company*, 184 Fed. (February, 1911), 358-360, is important:

"The defendants have answered as they are required to do under the statute and have fully met and denied all of the equities of the complaints. The answers are specific and under oath. In equity practice this is usually deemed sufficient to dissolve a restraining order and prevent the issuance of an injunction *pendente lite*; that is to say, where the equities of the bill are denied fully and explicitly by a sufficient answer under oath, the court usually denies an injunction *pendente lite* for the reason that such an answer is deemed to overcome the equities of the bill."

To like effect is the language of Van Fleet, District Judge, found in

City of Sacramento v. Southern Pacific Company, 155 Fed. (1907) 1022:

"An attentive examination of the pleadings and the affidavits used at the hearing, in the light of the very full and thorough presentation of the matter by counsel for both sides, discloses no fact to take the case out of the general and well-settled rule that when, as here, the sworn answer fully and positively, in unequivocal terms, denies all the material allegations of the bill on which the complainant's asserted equity rests, a preliminary injunction will be denied or, if previously granted, will be dissolved. High on Injunctions, Sections 698, 1505; *Home Insurance Co. v. Nobles*, (Circuit Court), 63

Fed. 642; *St. Louis K. C. & C. Ry. Co. v. Dewees*, (Circuit Court), 23 Fed. 691."

The Injunction.

It is elementary that a Court should compare the injury that will be done to the defendant by the granting of a preliminary injunction with the damage the plaintiff will suffer if the injunction is refused. Such comparison is one of the most satisfactory tests available to determine whether or not an injunction shall be granted or maintained in force, and should always be applied.

Cases cited in:

- 1 High on Injunctions (4th Ed.), sec. 13;
- 1 Pomeroy's Equit. Rem., sec. 264;
- 16 Am. & Eng. Encyc. Law, 363;
- 10 Encyc. Pl. & Prac., 989;
- 22 Cyc. 978.

"The consideration of relative convenience and inconvenience to the parties is one of the principal guides which govern courts of equity in the matter of granting or withholding relief by interlocutory injunction."

- 1 High on Injunctions (4th Ed.), sec. 13.

"The granting of a preliminary injunction is discretionary with the court; the discretion to be exercised according to the circumstances of each case and the comparative injury that may result to the interested parties from its granting or denial."

De Koven v. Lake Shore etc. Co., 216 Fed. 955, 959.

And where there is doubt as to which party will

be subject to the "superior inconvenience", the defendant is to have the benefit of the doubt.

"Where the inconvenience seems to be equally divided as between the parties, the injunction will be refused and the parties left as they are until the legal right can be determined at law or upon final hearing."

1 High on Injunctions (4th Ed.), sec. 13; and cases cited.

"Where the inconvenience to result is equally divided, or the preponderance is in favor of the defendant, it will be refused."

Shinkle etc. Co. v. Louisville etc. Co., 62 Fed. 690, 692 (Lurton, C. J.).

This test, we respectfully urge, was not applied by the District Court in the present case. Had it been, the result it achieved might well have been different. For it would seem that, upon application of the test, the superiority of the defendants' interest to proceed on their way free of injunction, over the interest of the complainant which the injunction protected, must have become clear.

The defendants, in serving notice upon the plaintiff, were availing themselves of a right secured to them by the express terms of a Federal statute.

"Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper

published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

5 Fed. Stats., sec. 2324.

This right of the defendants

"given by the statute is a substantial one".

Badger etc. Co. v. Stockton Co., 139 Fed. 838, 842.

Not only was it created in the interest of those co-owners who have performed labor or placed improvements on mining claims, but in the interest of that larger public which is benefited by a development of the resources of the country.

"The evident purpose and object of the law of 1872 (section 2324) were to encourage the exploration and development of the mineral lands of the United States and the sale of the same, and that all the provisions of the law having been framed with that object in view, if the required work is not performed, after the expiration of the year, and notice of contribution properly served or sufficiently published, the rights of delinquents are absolutely cut off."

Elder v. Horseshoe etc. Co., 194 U. S. 248, 256.

"The mineral lands were the property of the government, and for the disposal of them it was competent for Congress to prescribe such conditions as in its judgment were required by a wise

public policy. The section of the statute providing for the extinguishment of the interest of a co-owner for his failure to contribute to the work of exploration and development is part of the very law upon which he is compelled to rely for the source of his title—for the existence of any right whatever.

“* * * the duty imposed by the statute upon a co-owner is not alone to his associates, but is also because of considerations of the common welfare. It is of public importance that the mineral resources of the country be explored and developed, and not left in indolent or indifferent hands. The policy exhibited in the statute would be ill subserved if, in the annual performance of labor and making of improvements, a co-owner of an unpatented claim might safely refuse or neglect to co-operate or contribute.”

Van Sice v. Ibex Mining Co., 173 Fed. 895, 896-7.

The defendants, it may be noted in passing, in their exercise of this right did not seek to take advantage of the complainant by following the less direct method of calling for his contribution. They did not avail themselves of their undoubted right under the statute to give notice by publication, which might or might not have reached the eye of the complainant, but gave him personal and actual notice.

Under the terms of the California statute controlling the manner of giving effect, within the state, to the forfeiture contemplated by section 2324 of the Revised Statutes, the right of the defendants was circumscribed by a limitation of time:

"Whenever a co-owner or co-owners of a mining claim shall give to a delinquent co-owner or co-owners the notice in writing or notice by publication provided for in section twenty-three hundred and twenty-four, Revised Statutes of the United States, an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded in the office of the county recorder, in books kept for that purpose, in the county in which the claim is situated, within ninety days, after the giving of such notice."

Civil Code of California, sec. 1426 o.

Whether or not this limitation, made by the Civil Code upon the right conferred by the Federal mining laws, is a proper and enforceable one, whether or not a notice and affidavit filed after the 90 days' period is effective, are questions that need not be discussed now. Suffice it that this positive limitation existed, that the defendants gave the required statutory notice, that the District Court, in the face of a law which made it mandatory upon the defendants to record their notice and the affidavit of service of the same

"within ninety days after the giving of such notice",

enjoined them from making such recordation, and that the period of ninety days within which such recordation might have been made has now elapsed. We have examined the few cases in which injunctions have been granted against the recordation of various papers; we have yet to find another instance

where, as here, such an injunction was maintained in spite of the fact that the recordation period was expressly limited. It would seem that the existence of such a provision should of itself be sufficient to incline a Court to the view that the defendant, whose right may be absolutely dependent, and is certainly to some degree contingent, upon his recording certain papers within a fixed time, can assert a stronger "convenience" than the plaintiff whose title, *if it exists*, may or may not be clouded, and if clouded probably less rather than more, by such recordation.

On the other hand the complainant's injury, had the injunction not been continued in force, is by no means so clear. He could still have paid, under protest, and subject to recovery by suit, the money due on his delinquent share and have obtained and recorded the receipt to which he would then have been entitled under the state statute. And the fact of his contribution would so have become a matter of record, and a sufficient answer to any claim of forfeiture.

Civil Code of California, sec. 1426 o.

Or he could have relied upon the alleged imperfections of the notice given him by the defendants, of which he makes so much in his bill (Tr., pp. 6, 7, 8), to invalidate the attempted forfeiture of his interest. For these appear on the face of the notice and, if complainant's point is well taken, its recordation would not have injured him a particle. If the objection that the notice showed certain of the defendants to be assignees of a co-owner, or the objection that it

did not show how much labor was done on each or any individual claim, was a substantial one, the proceeding for a forfeiture was vitiated at the outset. Certainly in such case there was no room for the issuance or maintenance of a preliminary injunction against the proposed recordation, since the only effect of such recordation would be to perpetuate the evidence of invalidity. The principle became applicable which refuses injunctive relief against the creation of threatened clouds when their insufficiency is manifest without recourse to extraneous facts. The rule has been thus stated in

1 High on Injunctions (4th Ed.), sec. 375:

“In the exercise of the jurisdiction for the prevention of cloud upon title, a distinction is drawn between cases where the invalidity or illegality charged as the cloud is shown by evidence *dehors* the record, and where it appears upon the face of the proceedings themselves. And while in the former case the relief is freely granted, in the latter courts of equity will not interpose.”

The principle is well established. We shall be content with a quotation of the language used by Chief Justice Field, in the case relied upon by the District Court, in its opinion in the instant case:

“The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist: if the proof

would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the Court; as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions resting upon instruments of that character must necessarily fail."

Pixley v. Huggins, 15 Cal. 128, 133.

This language has been often approved and adopted by the United States Courts and quotations from their decisions may be spared. A few citations may, however, be made.

Rich v. Braxton, 158 U. S. 375, 405-7;
Devine v. Los Angeles, 202 id. 313, 335;
Sonoma County Tax Case, 13 Fed. 789, 792;
Spring Valley W. W. v. Bartlett, 16 id. 615,
 625;
Ashburn v. Graves, 149 id. 968, 971-2 (C. C.
 A., 5th Circ.).

See, also:

Peirsoll v. Elliott, 6 Pet. 95 (Marshall, C. J.).

The distinction pointed out by Chief Justice Field has been generally admitted by the courts of other states. See cases collected in

1 Notes on Cal. Rep., p. 754;
 1 id. Suppl., p. 228.

The subsequent California cases are in accord, among them the following:

Bucknall v. Story, 36 Cal. 67, 70-1;
Schuyler v. Broughton, 65 id. 253;
People v. Center, 66 id. 551, 566;
Archbishop v. Shipman, 69 id. 586;
Russ & Sons v. Crichton, 117 id. 695, 703;
Maskey v. Lackman, 146 id. 777.

But, even granting that the complainant let the opportunity to pay his contribution pass, and that the notice was not defective on its face, would he in any event have suffered as much by the dissolution as did the defendants by the continuance of the injunction? He would have been as free to assert his claim before recordation as after. For if the proceeding of forfeiture was unwarranted it did not at all affect his rights.

Turner v. Sawyer, 150 U. S. 578;
Brundy v. Mayfield, 15 Mont. 201;
O'Hanlon v. Ruby etc. Co., 48 Mont. 65; 135
 Pac. 913.

His right, if it did exist, could be cut off only by notice of forfeiture "rightfully" given.

Elder v. Horseshoe etc. Co., 194 U. S. 256.

If the forfeiture were not "rightfully" noticed, presumably it would have no effect upon the title of complainant. Subsequent purchasers from the other co-owner would seem to be bound to satisfy themselves as to the righteousness of the proceeding and to take title subject to complainant's claims in that regard.

But at all events the complainant was amply protected. The filing of the bill acted as a *lis pendens* which would protect his interest against third parties.

And admitting, for the sake of argument, that the filing of the bill itself would not act as a *lis pendens* and that a sale of the property by the defendants, *pendente lite*, to a purchaser in good faith might have jeopardized the complainant's rights, those rights could yet have been very easily protected without trespassing upon those of the defendants. A notice of *lis pendens* might have been filed for record by the plaintiff, in an action to quiet title, or in this very proceeding, and all chance of any irreparable injury have been thereby prevented as to *all* parties. The courts will not enjoin against the creation of what may be a cloud upon the title where the complainant is or can be protected by a *lis pendens*. So, in a very recent case, on an appeal from an order granting a preliminary injunction, against a sale of real property pending suit to remove a cloud, the Circuit Court of Appeals for the Fifth Circuit said:

"The remedy by injunction in equity is an extraordinary remedy, and, of course, is granted only in cases where it is necessary to protect the rights of litigants. The bill fully describes the land in controversy, and all persons interested in the litigation are made parties. It is clear that the filing of the bill, under the rule as to *lis pendens*, charges with notice any one who may purchase any interest in the real estate after suit brought, and that a purchaser or incumbrancer, pending the suit, would take whatever interest he obtained, subject to the result of the suit. As a general rule, relief by injunction against a transfer of real estate by defendant which the plaintiff seeks to prevent will be refused when the effect of filing the bill, which operates as *lis pendens*,

is to afford sufficient protection against the transfer of the property *pendente lite*. I High on Injunctions (2d Ed.), sec. 333; Powell v. Quinn et al., 49 Ga. 523, 529; Smith v. Malcolm, 48 Ga. 343. If the plaintiff succeeds in obtaining a decree on final hearing, it will be conclusive against any one who may purchase pending the suit. Barstow v. Beckett (C. C.), 110 Fed. 826, 827. We find nothing in this case to take it out of the general rule indicated.

"On the argument of the case it was suggested that the doctrine of *lis pendens* was limited by Act No. 22 of 1904. Merrick's Revised Code of Louisiana (2d Ed.), page 748. The act, in brief, requires notice of the pendency of a suit, in order that it may operate as notice to third persons not parties, to be recorded in the mortgage office of the parish where the property to be affected is situated. Assuming, but not deciding, that this act would be applicable to, and that it could limit the effect of, suits pending in the federal equity courts, we see no reason why the notice may not be so recorded in conformity with the act. We do not think the failure of the plaintiff to comply with the statute would in any way add to his equitable right to an injunction.

"It was also suggested that the injunction did the defendants no injury, since the *lis pendens* had the same effect as the injunction. But the *lis pendens* would not prevent the defendants from dealing with the property subject to the result of the suit, whereas the injunction prevents them from transferring their interests subject to the suit."

Zander v. Phillips, 213 Fed. 29, 30.

Similarly, in one of the Georgia cases above cited it was said:

"No special cause is shown for an injunction—

no threat or offer by defendant to sell the land—no insolvency on his part, and the fraud charged, though strongly supported by affidavits, is strongly denied in the answer and in the affidavits offered by defendant. The bill calls for the delivery and cancellation of the deed, is filed in the county where the land lies and defendant lives, and the only danger complainant can apprehend is that the defendant may sell the land, and the consequent necessity of making the purchaser a party. He does not show that there is any reason to fear this. The protection that the doctrine of *lis pendens* gives him against final loss of title, by its going into an innocent purchaser, and the fact that defendant's solvency will protect him in any claim for rents, issues and profits, if such a sale were made, render it unnecessary, unless special reasons are shown, for an interference by the harsh writ of injunction."

Smith v. Malcolm, 48 Ga. 343, 346.

See, also:

Barstow v. Beckett, 110 Fed. 826, 827;
Clay v. Clay, 86 Ga. 359, 12 S. E. 1064.

New York decisions are to the same effect. In an action by creditors against an insolvent debtor and his wife, to set aside fraudulent transfers made by the former to the latter, a preliminary injunction had been granted against her disposition of both real and personal property. On appeal the injunction was continued as to the personal property, but otherwise was dissolved, the Court said:

"But as to the real estate brought into controversy in the action, the title to which has become vested in the debtor's wife, the injunction was

needless, for there the creditors' rights are amply provided for by the statute in permitting the complaint to be filed, together with a notice of the pendency of the action, containing a description of the property. So far as the injunction relates to the real estate, it should be modified by vacating that part of it."

Babcock v. Jones, 62 Hun. 565, 567; 17 N. Y. Supp. 67.

In an earlier case Chancellor Walworth had said:

"The only possible injury which he can sustain by a sale under the execution will be, to have a cloud cast upon his title. But a preliminary injunction is not necessary to prevent that effect of the sale; for the commencement of this suit, and the filing of a notice of the *lis pendens* in the clerk's office of the county where the land lies, will enable the complainant to obtain a decree at the final hearing, declaring that the judgment was not a lien upon the farm, and that the sale under the execution was void. This will effectually remove any cloud which may be cast upon the title by such sale. A preliminary injunction should not be granted, before answer, unless it is necessary to protect some interest or right of the complainant, which may be injured, impaired, or endangered, by the proceedings of the defendant in the meantime, as it frequently turns out, when the answer comes in, or at the hearing, that the sole object of obtaining the preliminary injunction was, to embarrass the defendant's proceedings, and thus compel a compromise.

"Injunction denied."

Osborn v. Taylor, 5 Paige, 515, 516.

In the present proceeding the Court, if it had wished, could have even gone beyond the cases last

cited and so far as to enjoin the defendants from disposing of their interests, yet such injunction at least would not have caused the immediate detriment which could not but follow one granted against the recording of a paper which should be recorded within a brief, stated period. The case, in this particular of the relative inconveniences, is very similar to those actions in which an injunction is asked against the voting by defendants of shares of corporation stock, standing in their names but claimed by plaintiffs, at a stockholders' meeting about to be held. In those cases the Court recognizes that an injunction preventing the voting of such stock would do irreparable damage to the nominal stockholder, for, granting that after the hearing on the merits his status is restored, he has meanwhile been deprived of a right for whose loss no adequate compensation can be made. In such a case, where such an injunction had first been granted, it was said on dissolution:

"Plaintiffs contend that this injunction was necessary to preserve the *status quo*. The general authority of courts of equity to grant injunctions *pendente lite*, so as to preserve the subject of the controversy until opportunity is given for full investigation, is a power in aid of justice, and most beneficial; but this powerful and peremptory instrumentality cannot be used to take property out of possession of one of the parties except under very extraordinary circumstances, where there is some pressing necessity to avoid injurious consequences that cannot be compensated in damages, and where the right is established with a certainty of proof that leaves no doubt. Acknowledged rights are more entitled to the protection of courts than the estab-

lishment of new and doubtful ones. The right of a majority of stockholders to control the corporation is an acknowledged and undisputed right, established by every legal sanction. That was the *status quo* that should have been preserved, but this order of injunction, obtained and executed in the manner already recited, had no other purpose and no other effect than to destroy the *status quo* which consisted in the right of the majority to control the corporation. * * *

"The subject-matter of controversy, which it is the sole object of the preliminary injunction to preserve in the condition in which it is until the merits can be heard, is not left in *status quo*. To all intents and purposes, this injunction ties the hands of defendants as completely as would be the case if there had been a final decision against them on the merits. They are deprived of their property for all purposes of voting and exercising rights of ownership as effectually as if their certificates of shares had been actually sequestered."

Lucas v. Milliken, 139 Fed. 816, 832, 835.

In a New Jersey case presenting much the same question Chancellor Green said at the final hearing, speaking of the earlier proceedings in the cause:

"The injunction was allowed, so far as to restrain the defendants from a sale or transfer of the said shares. But as the effect of restraining the defendants from voting upon the stock might have been to change the result of the election, and the consequent control of the affairs of the company against the wishes of those holding the legal title to a majority of the shares, without an opportunity of their being heard in defense of the charges in the bill, the injunction in that respect was denied."

Hilles v. Parrish, 14 N. J. Eq. 380, 381.

In these cases, as in ours, the relief prayed for, if granted, would stop the defendant short in the exercise of a right which he could only enjoy within a very limited time. As stated in the opinion in *Lucas v. Milliken*, to grant an injunction under such circumstances is not to preserve the *status quo*, but, so far as the party enjoined is concerned, to destroy it. The District Court, in order to prevent a cloud on complainant's title,—a cloud which was either no cloud or against which a *lis pendens* would adequately protect him,—created a cloud upon defendants' right or title under Section 2324 of the Revised Statutes and has placed them in the position where they must depend, to preserve that right or title, upon the by no means satisfactory argument that the provision of the state statute which they were prevented from obeying is invalid.

At this point it may not be amiss to point out the insufficiency of the allegations of the bill relied on to show an imminent irreparable injury to the complainant. They state (Tr., p. 26) that the recordation, if permitted, will cloud the complainant's title. That this allegation is insufficient, in view of the foregoing authorities, has already been shown. The bill adds (Tr., p. 26) that complainant will be compelled

“to institute and prosecute a great number of suits to remove said cloud, at great and exorbitant expense”,

and a few lines further the allegation is repeated, such anticipated suits being

"to remove the clouds cast upon his said title and interest".

These are the only allegations, apparently, on which reliance is placed to show that complainant, unless the injunction is issued, will be

"irrevocably and irreparably damaged and injured, and be defrauded or deprived of all his right, title and interest." (Tr., p. 27.)

We submit they are not sufficient to achieve the desired result. There are here no ultimate facts pleaded, either of a threatened damage or of a threatened multiplicity of actions. Without such pleading of facts the mere allegations of anticipated injury cannot receive any weight.

"The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective."

Cruickshank v. Bidwell, 176 U. S. 73, 81.

"The bill contains a bald averment that irreparable injury will be inflicted upon the complainant by its removal from the land, but it contains no allegation of any facts from which the court can see or infer that any irremediable mischief will result."

Indian etc. Co. v. Shoenfelt, 135 Fed. 484, 486, (Sanborn, C. J., C. C. A., 8th Circ.)

See, also:

Morris v. Bean, 123 Fed. 618, 621;

Pullman Co. v. Tamble, 173 *Id.* 200, 205.

For all that appears the fears of the complainant are groundless. Equity, it is clear, will not be induced to act upon such fears, when it is not put in possession of the facts from which it may determine whether or not they are justified.

"If any cloud at all exists, it is but the translucent mist which adorns a summer's sky, not one which wears upon its face the menace of a threatened storm."

Thompson v. Etowah Iron Co., 91 Ga. 538;
17 S. E. 663, 665.

The facts stated, moreover, shows that no such manifold litigation as is dreaded will necessarily, or in fact can, follow from the circumstances prevailing. The only parties that appear to be even potentially claimants adverse to complainant are the three defendants in this suit. They are not alleged to have commenced or to be about to commence any suits at all. They are bound by the eventual decree in this case, on the merits. Their assigns, if any they have, will or can be similarly bound, by an application of the doctrines of *lis pendens*. There is no one else interested in the subject-matter of this proceeding. And even if there were, they are not parties and the injunctive relief granted does not operate to bind them.

"Nor do we think that there is any danger of a multiplicity of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought, and that by direction of the city council. It remains pending, and when it reaches judgment it will determine finally every question in dispute between the parties.

There is no need of any other suit except to prevent the running of the statute of limitations and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties."

Boise etc. Co. v. Boise City, 213 U. S. 276, 286.

"A complaint for an injunction which does not state facts sufficient to determine how plaintiff's property will be permanently injured by the acts complained of, and which states merely general conclusions, as to multiplicity of suits and irreparable injury, not warranted by any pleading of facts, does not state facts sufficient to constitute a cause of action for equitable relief to enjoin the acts complained of."

Willis v. Lauridson, 161 Cal. 106, 117. (Reversing order refusing to dissolve injunction.)

Other Considerations.

We have not yet commented in this connection upon the fact that all of the material allegations of the bill are controverted by the affidavits of the defendants. Yet this fact is one bearing with immediate importance on this point. Even where the bill is not denied the Chancellor will, of his own motion, dissolve the injunction where the balance of convenience makes it proper to do so.

"Although the equity of the bill is not answered, if the continuation of the injunction is a material injury to the defendant, and its dissolution is no present injury to the complainant, or cannot prejudice his right, this court may, in its discretion, dissolve the injunction."

Bechtel v. Carslake, 11 N. J. Eq. 244, 245.

Where the equity of the bill is refuted by answering affidavits there would seem to be no question that a dissolution of the temporary injunction becomes imperative.

"The bill charges that it is so done. The answer denies this, and in this respect it is directly responsive to the bill. By the law an answer so responsive is evidence which must be overcome by other evidence or stand. It is said that the orator waived an answer under oath, as the rules in equity provide may be done. This is not understood to take away the right to answer under oath, and, when a defendant does so answer, the effect of the answer as evidence would appear to rest upon the law of the subject, which the rules of court do not appear to attempt to change. The answer must therefore, in this respect, for the purpose of this motion, be taken to be true."

Woodruff v. Dubuque etc. Co., 30 Fed. 91, 93-94.

"These several allegations of the defendants, although in form affirmative, are directly responsive to the bill, and, by controverting the same, raise material issues, whereby the burden was laid upon the plaintiff of proving this part of its case by sufficient evidence. Having failed to introduce such proof, the allegations of the defendants must be accepted for the purpose of

the case as being strictly true, and they present an insurmountable obstacle to the granting of equitable relief to the plaintiff."

Spokane etc. Co. v. Spokane Falls, 46 Fed. 322, 323.

"It thus appears that the answer not only puts in issue all the material averments of the bill, but fully negatives its equity; and it is therefore obvious, under the rule above stated, that whatever the ultimate rights of the parties may, upon a final hearing of the suit, be found to be, the plaintiff is not entitled to a preliminary injunction, except it appear either that irreparable injury will result or that some special or peculiar circumstances exist to warrant a departure from the rule. No such circumstances are disclosed, nor is there anything to indicate that any material injury whatsoever, not already accrued, will result to the complainant's interests from the alleged acts of the defendants."

Sacramento v. S. P. Co., 155 Fed. 1022-3.
(Van Fleet, D. J.)

"Since this is a motion for a preliminary injunction, all disputed facts must be resolved against the plaintiff."

Photo etc. Co. v. Social etc. Co., 213 Fed. 374, 376. (Hand, D. J.)

"The rule is well settled that an injunction should not be granted *pendente lite* upon a complaint alone where, in response thereto, a verified answer is filed explicitly and unequivocally denying the allegations of such complaint. (Spelling on Injunctions, 2d ed., sec. 1019.)"

Martin v. Danziger, 21 Cal. App. 563, 564.

See, also:

Davison v. National Harrow Co., 103 Fed.
360;
Woodside v. Tonopah etc. Co., 184 Fed. 358,
361 (Morrow, C. J.).

No Bond Was Required of the Complainant.

Among the allegations of the affidavits of defendants, used on their motion to vacate and dissolve, is one on information or belief to the effect that the complainant is financially irresponsible. (Tr., p. 70.) No such charge against the defendants is contained in the bill. But even was the balance of inconvenience not in favor of the defendants at this point, it would have seemed, in view of the rights of the defendants jeopardized by the retention of the injunction, that the District Court could only act within the bounds of its discretion, in making the order appealed from, if and upon requiring a bond by the complainant, in a substantial sum, protecting the parties enjoined. So the Circuit Court of Appeals, Fourth Circuit, said, in a case where an injunction had been granted against the cutting of timber, without requirement of any bond to protect the defendant:

“Reviewing the record as it appears here, the court below should have required, from the receiver, bonds with surety for the proper discharge of his duties as such receiver, and also the court should have required an injunction bond from complainant.”

Staffords v. King, 90 Fed. 136, 142.

Similar reasons apply to our case as led one Court to say:

"It would not be fair absolutely to enjoin all action by the city on this subject during a period of time when it might by pressure be able to secure the performance of some conditions in default, and then leave it, at the end of the litigation, with an abstract decision in its favor, but without any security for such performance and in a condition where performance could not be enforced. The complainant, as a condition of having equitable relief, should provide whatever security the situation permits to the effect that the railways company will perform, if it is found in default."

Knickerbocker etc. Co. v. Kalamazoo, 182 Fed. 865, 874.

See, also:

U. S. v. Jellico etc Co., 43 Fed. 898.

State courts, in jurisdictions where the requirement of a bond lies in the discretion of the trial court, also recognize that that discretion is only properly exercised by the lower court when, damage to the defendant being likely, the injunction is granted upon substantial security.

"We also feel it our duty to refer to the danger of interfering in the outset of a case by injunction, with interests where delay may work great damage, without making full provision for redress by an adequate injunction bond. Defendants ought not to be subjected by the machinery of the law to irreparable mischief.

"The decree should be reversed, and the bill dismissed, with costs of both courts."

Torrent v. Common Council, 47 Mich. 115, 41 Am. S. R. 715, 719.

"The trial court may, in the exercise of his discretion in a proper case, order the issuance of a preliminary writ of injunction without requiring of the applicant a bond. There is nothing in the present case, however, to justify the exercise of such a discretion, if it exists under our statute; and the judgment is therefore reversed for the want of such bond. *Downes v. Monroe*, 42 Tex. 307; *Nicholson v. Campbell*, 15 Tex. Civ. App. 317, 40 S. W. 167. Some of the members of this court are inclined to the view that in no case is a judge authorized to order the issuance of a preliminary injunction without at the time requiring of the applicant proper security in the form of a bond.

"Reversed, and order vacated."

Pierson v. Connellee (Tex. Civ. 1912), 145 S. W. 1039.

"We are of the opinion that the court, in view of all the facts disclosed from the sworn pleadings, erred in granting said injunctive order without bond. Section 9 of chapter 69 of the Illinois Statutes requires an injunction bond except where, 'for good cause shown', the court be of the opinion that the injunction ought to be granted without bond. We think that the chancellor's discretion in granting the injunctive order in this case without bond is a proper subject for review by this court. By the order Lynch, as trustee, is prevented from collecting, by the usual legal procedure, a large sum of money from the Lorimer Co., apparently until a complicated chancery litigation is concluded. He is so prevented at the instance of a party who claims but a fractional portion of said sum, and who, at the conclusion of said litigation, may or may not be decreed to be entitled to that portion. In the meantime, if Lynch should establish his contention that Redfield is entitled to no part of said

sum, the rightful owners of the same will suffer considerable damage in loss of interest and otherwise. The interest on said sum at the legal rate amounts to more than \$6,700 per year, and it is charged that Redfield is financially irresponsible. Because of the possible failure of Redfield after a full hearing on the merits satisfactorily to establish his claim to a portion of the fund, and a portion of the stock so held by Lynch as trustee, it seems to us equitable that provision be made for the payment of all damages resulting to the owners of said fund occasioned by the wrongful tying up of the money *pendente lite*. For the reasons indicated, the order of the Superior Court will be reversed."

Redfield v. Lorimer etc. Co., 174 Ill. App. 547, 556.

See, also:

Potter v. Potter, 59 App. Div. 140; 69 N. Y. S. 183, 185;

Price v. Grice, 10 Idaho 443; 79 Pac. 387, 390.

We appreciate that, under the rules, whether or not a bond shall be required is a matter resting in the sound discretion of the Court of first instance. But that discretion must be exercised within the usual bounds and must be subject to review for improvidence or abuse. In the present case, we submit, a case is presented in which such improvidence appears. The defendants made their motion for dissolution and vacation upon the ground of the complainant's inability to respond in damages:

"That said order does not provide for any security for defendants' costs and damages and it

appears from the affidavits served herewith that complainant is financially irresponsible." (Tr., p. 48.)

The complainant's financial responsibility was directly assailed by the defendants (Tr., p. 70); their own was not questioned. He was or could be protected against eventual damage by a *lis pendens*; the defendants could not be. Yet, in the face of almost certain damage to them, if it were proved the injunction should not have issued or remained in force, no bond was required. The order does not even impose a condition that the complainant must make good, if ordered by the Court, any damage that may accrue to the defendants. The granting of an injunction upon such "terms", even where no bond is required, protects the defendants to a much greater extent than if they were remitted to a suit at law to recover the amount of their loss. So, in one case, where the order granting the preliminary injunction provided:

"It is further ordered that the complainant pay the defendant such resulting damages as it may sustain in case it be finally decided that said injunction ought not to have been granted",

upon the dissolution of the injunction the Court provided,

"And the question of damages, if any resulting to the defendant from the wrongful granting of the said injunction, is hereby reserved for the further order of the court herein,"

and thereafter referred the assessment of damages to a master.

Mica etc. Co. v. Commercial etc. Co., 157 Fed. 92, 93.

Such a provision might well have been inserted in the order here. Or the injunction might properly have been vacated, *defendants* being required to give a bond for complainant's protection.

"The time during which the plaintiff's patent has yet to run is now very short, and, while we must affirm the order, *we think, in view of the serious consequences which might occur to the defendant from an interruption of its business, equity will be best subserved by suspending the injunction, upon the defendant's giving a bond sufficient in form and substance to be approved by the clerk of the Circuit Court, conditioned to satisfy all such damages as the plaintiff may sustain from the continuation of the use of the invention in the defendant's business, to be hereafter found and decreed.*" (Italics ours.)

Interurban etc. Co. v. Westinghouse etc. Co., 186 Fed. 166, 170.

As the case now stands, however, defendants themselves solvent have been damaged at the instance of a complainant of doubtful responsibility, without the slightest provision made for their protection. The complainant's doubtful rights have been cherished by the Court, without adequate or any consideration of the defendants' substantial equities. The Court's opinion, given on the order to show cause why the preliminary injunction should not issue, does not even

be made by one "having knowledge of the facts". That this rule of the Supreme Court is recent and therefore has not called for interpretation does not render its authority any the less potent.

Further, the affidavit to the bill does not show that the complainant is unable to verify the bill; more than that, it does not show that the facts alleged are within the knowledge of affiant. For, as to the allegations made upon information and belief, the only oath is that affiant

"believes them to be true".

Is this sufficient? Can any outside party, without showing the inability of complainant to verify the bill, effectively swear to such allegations on the ground of *his* belief? If such is the case, of what value is a verification? Should the affiant not state at least from whom he obtains the facts upon which his belief is founded? Should he not swear positively, on information and belief, to the truth of the allegations made by him? If the field is thrown open to verifications by *anyone* who "believes" in the truth of the statements pleaded, without stating his ground of belief, and without swearing positively on his information and belief, every pleading, no matter how extreme, can and will be very easily verified!

As a matter of fact, such a result is not permitted. The rule actually enforced is quite different from any followed by affiant here:

"The proper verification of the bill is a matter of importance, since an injunction is seldom al-

lowed upon other than a sworn bill. Nor will it suffice that the material facts constituting the equity on which the injunction is sought are verified by complainant upon information and belief, but they should be positively sworn to. So when an injunction is sought upon the ground of fraud it is not sufficient that the allegations of fraud should be upon information and belief, but they should be positive and founded upon plaintiff's own knowledge, or that of some person conversant with the facts. And where, upon an *ex parte* application for an interlocutory injunction, complainant states the facts on which his equities rest upon information and belief, he should present affidavits of their truth from the person of whom his knowledge is obtained and who can swear positively to the facts."

2 High on Injunctions (4th Ed.), sec. 1567.

"Where the injunction is sought upon affidavits of others than the plaintiff, if any material allegation or charge which is necessary to be sworn to positively is not within the personal knowledge of the agent or attorney who verifies the bill, he should, in addition to his own verification, annex to the bill an affidavit of the person from whom he derived his information, swearing that he knows such allegations or charges as are within his knowledge to be true and that the others he believes to be true, in the same manner as if the bill had been sworn to by the plaintiff himself and some of the material facts to sustain the injunction depended upon information derived by the plaintiff from others."

10 Encyc. Pl. & Pr., 970.

See, also:

1 Foster's Fed. Prac. (5th Ed.), sec. 293, and cases cited.

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See, also:

1 Foster's Fed. Prac. (5th Ed.), sec. 293, and cases cited.

The Courts often will require even a *complainant* praying for an injunction to bolster up his allegations made on information and belief by a statement of the source from which the information is derived or of the basis for the belief. One or two citations follow:

"This verification was not sufficient to entitle the party to an injunction upon a good bill. The rule is that where an injunction will affect the rights of persons who have no opportunity to be heard in opposition to it, the plaintiff must, in addition to his own affidavit, where he has not personal knowledge of the facts, annex the affidavit of a person who has such knowledge."

Southern etc. Co. v. Hixon, 5 Ind. 164, 168.

"As to the bill itself, however, it is sworn to upon the best of the knowledge, information, and belief of the affiant, and the defendants object to the granting of an injunction on this verification, unaccompanied by affidavits of the facts from those from whom the knowledge, information, and belief of affiant were derived. The objection is well taken."

Ruge v. Apalachicola etc. Co., 25 Fla. 656; 6 So. 489, 490.

"It is also the settled law here that not only must the allegations in the bill for an injunction be clear, direct, and positive, but that they must be verified by an affidavit, which also must be direct and positive; and, where any of the material allegations in the bill are stated upon information, there should be annexed to the bill the additional affidavit of the person from whom the information is derived, verifying the truth of the information thus given."

Godwin v. Phifer, 51 Fla. 441; 41 So. 597, 601.

Chancellor Walworth of New York made a similar requirement:

"Where an *ex parte* injunction is granted, as in this case, upon the mere oath of the complainant as to his belief of the material facts charged, and without any excuse for not procuring and annexing to his bill the affidavit of the person from whom the complainant's information was derived, and who professed to know the facts charged, it is a matter of course to dissolve the injunction, before answer, upon a proper application, under the provisions of the 34th rule."

Campbell v. Morrison, 7 Paige, 157, 161.

Where an *attorney or agent* of the complainant verifies the bill, the rule is naturally even more stringent and more generally recognized and enforced. The necessity for knowing the source of information then becomes even stronger.

"He does not show any reason whatever why the affidavit was not made by one of the plaintiffs. The affidavit is clearly insufficient. We do not mean to hold that an injunction may not be issued upon an affidavit sworn to upon information and belief *if the source of the information is set forth, and it is shown why the person knowing the facts cannot be procured to make the affidavit.* Under the provisions of section 4199, when the pleading is verified by the attorney or any other person except one of the parties, he must set forth in the affidavit the reason why it is not made by one of the parties. So, we think, when an affidavit is made for the purpose of procuring an injunction, the one who knows the facts should make the affidavit if he can be procured to do so, and, if he cannot, and the affi-

davit is made by the attorney, the reasons why he makes the affidavit should be fully set forth, and the affidavit should show why the party who personally knows the facts does not make the affidavit. The affidavit in this case is not sufficient to warrant the granting of an injunction." (*Italics ours.*)

Wiles v. Northern Star etc. Co., 13 Idaho, 326; 89 Pac. 1053.

"When the affidavit on its face shows, as this one does, that it is *made not by a party to the cause*, but by a person who could not know the facts except by hearsay, unless his means of knowing them in such a way as to authorize him to testify be disclosed, a court has no right to assume that his knowledge is personal, rather than hearsay, if it may be either the one or the other. If it be hearsay, it is not sufficient to verify a bill for an injunction. If his knowledge be personal, it ought to appear that it is.' The reason of the rule is that *there must be at least prima facie evidence of the facts on which the complainant's equity rests, so that the confidence of the court may be obtained, before it can be called upon to issue an injunction. That cannot be done by an affidavit of one not a party to the cause, who simply swears that the matters and things stated in the bill are true to the best of his knowledge and belief, but does not inform the court as to the source of his information or what knowledge he has on the subject.* That defect in the bill was, therefore, sufficient to justify the court in refusing to grant an injunction." (*Italics ours.*)

Moffatt v. County Commissioners, 97 Md. 266; 54 Atl. 960, 961.

"In the case of *ex parte* applications for injunctions, or *ne exeat*s, founded upon such bills,

of any material allegation or charge which is necessary to be sworn to positively, to authorize the issuing of the injunction or *ne exeat*, is not within the personal knowledge of the agent or attorney who verifies the bill, he should, in addition to his own verification, annex to the bill an affidavit of the person from whom he derived his information, swearing that he knows such allegation or charge to be true."

Bank of Orleans v. Skinner, 9 Paige, 305, 307 (Walworth, Ch.).

"This affidavit is made by the attorney, and it has often been held that, where the attorney makes it, he must do so upon his own knowledge. An affidavit to the 'best of my knowledge and belief' is insufficient."

Lane v. Jones, (Tex. Civ. 1914), 167 S. W. 177, 179.

In an even later Texas case, where the complainant's attorney of record took oath that he believed the allegations of the bill to be true, the Court said:

"This being an appeal from an order granting a temporary injunction, we must look to the sufficiency of the application, because it was not a trial on the merits and no evidence was heard. In such case the test of the matter is as to whether the application itself meets the requirements of the statute; for on that, and that alone, the court bases its judgment. Measured by the statute, and, in the light of decisions construing same, this application was insufficient. If the facts set up in the application be true, we do not mean to state that the trial court was in error in pursuing the course taken in its entirety; but *the very foundation of the same is the affidavit*, and, since that does not meet the requirements of the statute, the matters set out stand as mere un-

supported allegations which would not justify the court in assuming the truth of the same. This requires a reversal of the judgment." (Italics ours.)

Kopplin v. Ludwig, (Tex. Civ. 1914), 170 S. W. 105.

The fact that the affiant is *a total stranger* to the cause perceptibly weakens the value of any verification, but particularly one made in whole or in part upon information and belief.

"An affidavit made by a person apparently not connected with the suit is practically no affidavit."

Smith v. Frohlich, (La. 1914), 66 So. 163, 164.

In a Georgia case it was said:

"There was absolutely no evidence before the chancellor in this case except the mere belief of one of the complainants' counsel, which may have been founded, for aught that this record discloses to the contrary, upon hearsay alone. The chancellor was right to refuse the application on this ground, and such being the case, it is unnecessary to examine the bill to see whether the facts therein alleged, if properly verified, would make a case for equitable interference.

"In the case of a motion to dissolve an injunction this rule is well settled. 3 Kelly, 435; 8 Ga. 197; 15 *Ib.* 533, 19 *Ib.* 277; 24 *Ib.* 636; 30 *Ib.* 931.

"In 33 Ga. 138, it is true that the court ruled that an affidavit by one of the parties, in language like this, is sufficient; but *the party making the affidavit there was an active participant in the main transaction*, and knew many facts as his own act and deed.

In 37 Ga. 358, it was held that *an executor, who had not participated in the transactions, and who swore from belief, could not verify the facts so as to procure an injunction*; and in 39 Ga. 139, it was held that a charge on information received from others was insufficient.

"See, also, 24 Ga. 406; 25 *Ib.* 629; 23 *Ib.* 480; on *ne exeats* and on injunctions, 49 Ga. 81. The reason of the rule is sound. *Any other rule would allow counsel to procure an injunction for their clients on belief founded on mere rumor.*" (Italics ours.)

Hone v. Moody, 59 Ga. 731, 732.

CONCLUSION.

We respectfully urge in conclusion that in the two cases now before the Court there are presented two errors on the part of the District Court:

1. (a) The erroneous hypothesis of pertinent fact upon which the lower Court proceeded in the issuance of the injunction *pendente lite* in the first instance, upon unverified material facts;

(b) The erroneous hypothesis of pertinent law in the issuance of the injunction upon the assumption that the case, either upon the bill alone, or as a whole, presented the equity necessary to warrant injunctive relief.

2. The improvident exercise by the District Court of its legal discretion in (a) disregarding the cardinal equity principle that complainant, for an injunction, must present a case free from doubt; and (b) in disregard of the fundamental rule that such equities as may be in a bill are overcome by positive denials of the facts constituting said equities.

Appellants therefore respectfully urge a reversal of the order denying the motion (1) to vacate the order for an injunction *pendente lite*, and (2) to dissolve the said injunction issued thereon, together with appellants' costs on these appeals incurred.

Dated, San Francisco, California, January, 1915.

Respectfully submitted,

Charles W. Slack

JOSEPH K. HUTCHINSON

Solicitors for Defendants and Appellants.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Appellants,

VS.

E. THOMPSON,

Appellee.

Brief on Behalf of Appellee.

Upon Appeal from the United States District
Court for the Southern District of California,
Southern Division.

R. P. HENSHALL,
Merchants National Bank Bldg., S. F.,

H. L. CLAYBERG,
JNO. B. CLAYBERG,
WELLES WHITMORE,
Pacific Building, San Francisco,
Solicitors for Appellee.

Filed this.....day of January, A. D., 1915

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk

THE TEN BOSCH COMPANY, SAN FRANCISCO

FEB 1 - 1915

F. D. Monckton,

NOS. 2539 AND 2540

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS W. PACK,
STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

These are appeals from an order refusing to vacate an order granting an injunction *pendente lite* and refusing to dissolve such injunction.

Counsel for appellants have only filed and served one brief in the two cases and, for convenience of consideration, we shall do likewise.

It seems important to call the attention of the Court briefly to some particular parts of the statement of the case contained in appellants' brief, as follows:

The respective bills of complaint were filed in the District Court of the United States in and for the Southern District of California, in November, 1914, and upon the filing thereof an order to show cause was issued against the defendants therein, why injunctions, *pendente lite*, should not be issued as prayed for, and in the meantime the defendants were restrained until the decision on the hearing of the order to show cause. Upon such hearing, the Court directed the issuance of an injunction *pendente lite*; appellants filed with their motion to vacate such order and dissolve the injunction, the affidavits of Joseph K. Hutchinson, Thomas W. Pack and Stella Schuler.

The purpose of the bills of complaint was to procure an accounting of the moneys claimed to have been expended by Thomas W. Pack, one of the appellants, in the alleged annual representation of certain placer mining claims, described in the Bills of Complaint, and to enjoin the defendants named therein from taking any further steps toward a forfeiture of complainants' rights and interests in these placer claims until it could be determined how much, if any, money had been actually paid by Pack in such alleged annual representation of the claims. The complainants, by their bills, offered to pay the

defendants in said suits whatever amount the Court might decide had been expended by Pack for the purpose of annual representation.

The Positive Allegations of the Complaint Sustain the Injunctions.

The positive allegations in these complaints were so admirably summarized by Judge Bledsoe in his opinion rendered on the orders to show cause, that we will quote and utilize the same:

“That the plaintiff in the year nineteen hundred and ten, in conjunction with the defendant, Pack, and certain other individuals mentioned, located and recorded one hundred and seventy-five certain placer mining claims, situate in the County of San Bernardino, State of California; that plaintiff is now, and ever since the day of said location, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; that during the month of September, in the year nineteen hundred and fourteen, the defendant herein caused to be served upon plaintiff a certain notice of forfeiture, set out in the bill of complaint, and by which it was sought, pursuant to the Sections of the Revised Statutes and Civil Code above referred to, to forfeit the title of plaintiff in and to each and all of the one hundred seventy-five (175) described placer mining claims heretofore referred to; That said notice contained the appropriate statements that unless plaintiff, within ninety days after the service of the same upon him, paid to the defendants or to the defendant Joseph K. Hutchinson for said defendants, the sum of

seven hundred dollars (\$700) claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack, upon said claims, in the years nineteen hundred and eleven (1911) and nineteen hundred twelve (1912), that the interest of plaintiff would become forfeited to the said Joseph K. Hutchinson; plaintiff then alleges that the said Pack did not expend, or cause to be expended, of his own money, during the years nineteen hundred eleven (1911) and nineteen hundred and twelve (1912) or at any other time the sum of fifty-six hundred dollars (\$5600) of which the said seven hundred dollars (\$700) was the one-eighth part upon or for, the benefit of said placer mining claims, or at all; that at least twenty-eight hundred and thirty-six (\$2836) was contributed by plaintiff and his co-locators to the defendant Pack, for the purpose of doing the assessment work upon the claims mentioned, for the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912); plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims, was obtained and is held for the sole use and benefit of the Foreign Mines and Development Company, and the American Trona Company and the California Trona Company."

All these allegations are made positively in the complaints and each and all of them are supported by the positive affidavit of Henry E. Lee attached to the several complaints. True, the complaints contain many allegations made upon information and belief, which seems to be necessary to raise and try issues upon matters connected with, explaining and fortifying the positive allegations above quoted. Such

allegations, however, were not considered by Judge Bledsoe, as is shown by his opinion (Trans. p. 44).

Upon these positive allegations, positively verified, we base the validity of the orders appealed from.

Preventing Casting of Cloud upon Title.

These allegations clearly show that defendants therein are about to take such steps as would cast a cloud upon the title and interest of the respective complainants in the placer mining locations named in the bill. Judge Bledsoe so held and based such holding upon the authority of *Pixley v. Huggins*, 15 Cal. 128 (Trans. p. 47).

In that case Judge Field used the following language:

“Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed be required to offer evidence to defend a recovery? If such proof would be necessary the cloud would exist; if the proof would be unnecessary no shade would be cast by the presence of the deed.”

Anything that has a tendency, even in the slightest degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is a cloud upon title. *Whitney v. Port Huron*, 88 Mich. 268.

“A cloud upon one's title is something which shows *prima facie* some right of a third person to it.” *Waterbury Savings Bank v. Lawler*, 46 Conn.

243. "A cloud is said to be the semblance of a title, either legal or equitable, as a claim of an interest in lands, appearing in some legal form." *Rigdon v. Shirk*, 127 Ill. 411.

In *McConnaughy v. Pennoyer*, 43 Fed. 339, plaintiff brought suit to enjoin a sale of certain swamp land by the land commissioners of the State of Oregon, claimed by plaintiff as forfeited to him by the State under contracts. The Court says:

"The defendants have the general and exclusive authority to dispose of the swamp lands of the State, including those which may have reverted thereto for delinquency under Section 9 of the Act of 1878. The plaintiff, to overcome the apparent legal title which the sale and conveyance of his land would vest in the defendant's grantee, would be obliged to resort to extrinsic evidence to show that this land had been duly bargained and sold to his grantor, and had not reverted to the State under Section 9 of the Act of 1878, and therefore the second sale was unauthorized and wrongful.

"This constitutes a cloud on title within all the authorities."

So here, the respective complainants would be compelled to resort to extrinsic evidence to show that the pretended Notices of Forfeiture were not effective. Under Section 14260 of the C. C., such papers, after having been filed, become *prima facie* evidence that the respective co-owners have not contributed to the representation of the placer claims in question, as stated in said pretended Notices of Forfeiture.

The Supreme Court of California in the case of Lubbock v. McMann, 82 Cal. 226-230, says:

“But though the sale of a homestead under execution conveys no title, it may create a cloud and involve the homestead claimant in litigation and will therefore be enjoined.”

So we must conclude that the filing of copies of these pretended Notices of Forfeiture, together with affidavits of service, under Section 14260, C. C., would cast a cloud upon the respective complainants' title in and to the placer claims described in the several complaints.

No doubt but that equity has jurisdiction to *prevent* the casting of a cloud upon title. It is a well settled doctrine that inasmuch as a court of equity can *remove* clouds cast upon title, it has equal power to *prevent* a cloud being cast upon the title. This is axiomatic and should not require the citation of authorities. If a court can remove a cloud from a title, it certainly has power to prevent any cloud being cast thereon.

Pixley v. Huggins, 15 Cal. 128;

Palmer v. Boling, 8 Cal. 388;

Tibbetts v. Fore, 70 Cal. 243-47;

Mechanics Bank v. City of Kansas, 73 Mo. 555, 559;

Hare v. Carnall, 39 Ark. 196, 202;

Burnett v. Cincinnati, 3 Ohio 73, 88;

McConnaughy v. Pennoyer, 43 Fed. 339.

The bills of complaint might be sustained upon this theory alone. However, it is well established and, doubtless, undisputed, that equity has complete jurisdiction to prevent a multiplicity of suits.

Multiplicity of Suits.

In one of the suits in which the orders appealed from were entered, there are involved 44 placer mining claims and in the other 12 placer mining claims. If the appellants herein had not been enjoined and had filed copies of their notices of forfeiture and affidavits of service, they would thus create a *prima facie* case of failure on the part of complainants to contribute their shares of the assessment work. Under the Statutes of the United States, Section 2324, R. S. U. S., such failure would cause a forfeiture of the rights of the respective complainants. This would authorize the defendants to immediately sell and convey all, or any, of the rights of the respective complainants to third persons. Such conveyances might be many hundred in number. They could convey one claim, or any fraction of any one claim, to any one party, and if that party's deed was recorded, it would require *innumerable* suits in equity on the part of complainants to remove the cloud upon their titles thus imposed. (We are not unmindful of the rule of *lis pendens* announced by the appellants in their brief, but will consider the authorities cited by them later on in this brief.)

We again refer to the case of *McConnaughy v. Pennoyer*, 43 Fed. 339, in which the Court says:

“The defendants are not now authorized to dispose of swamp land in larger quantities than 320 acres to any one person, and that may be sold outright, and a conveyance made to the purchaser at once. The disposition of this large tract of land in this manner may involve at least 150 sales, to as many different persons. If such sales are allowed to be made, the plaintiff will be compelled, in the assertion and maintenance of his right, to bring a separate suit in equity against each of such purchasers, to quiet title or to charge him as a trustee of the legal title for the benefit of the plaintiff, the owner of the equitable estate.

“This presents a very strong case of a multiplicity of suits, that may be prevented by this suit, in which the whole matter may be considered and determined at once, and thus save expense and delay to all persons concerned.”

It must be remembered that this case was appealed to the Supreme Court and affirmed in 140 U. S. Rep. p. 1.

We, therefore, submit that the Court would be justified in granting the injunction to prevent multiplicity of suits, and to issue the injunction complained of in aid of that jurisdiction.

Complainants Are Entitled to an Accounting.

There is still a further ground upon which the jurisdiction may be rested and that is, the respective complainants allege that they are not informed and

cannot ascertain how much, if any, money the defendant Pack expended in the representation of said placer claims, and ask that the defendant Pack account in these actions to the Court, and the respective complainants, for all moneys which he claims to have spent, and that the respective complainants will, when said accounting is had, and such showing made, pay whatever amount the Court finds that Pack has expended in the representations of these placer claims.

This Court has jurisdiction of these cases for this purpose, as well as others, and in order to retain the *status quo*, has full authority to enjoin the defendants from interfering with, or doing any act, which would change the situation of the parties or their rights to the property.

Comparative Injury to Respective Parties.

Counsel insists that the Court should consider the comparative injury of both parties in determining whether or not an injunction should issue, and says: "Such a comparison is one of the most satisfactory tests available to determine whether or not an injunction should be granted or maintained in force and should always be applied."

In their comparison, however, they seem to overlook the fact that the forfeiture claimed by them does not arise, and is not perfected, by the filing of the copies of the Notices of Forfeiture, together with affidavits of service thereof, and seem to take the position that if they are not allowed to file such

Notices and Affidavits within ninety days after the service of the Notice, all their rights under the Notice cease and become inoperative. They take this position because of the provisions contained in Section 1426⁰ of the C. C. of Cal. It must be remembered that this section does not provide for the forfeiture of any rights, but only provides for the filing of a copy of the Notice of Forfeiture, together with an affidavit of service, in order that there may be some record of the action of those who seek a forfeiture under the Statutes of the U. S. The filing of the Notice and Affidavits does not *work a forfeiture*. That is done by the provisions of the Acts of Congress. A forfeiture may, therefore, be complete if no copies of affidavit are filed. Apparently, the only objects to be gained by the filing of the Notice of Affidavit are to creat a *prima facie* case in favor of forfeiture, and have placed upon the records of the county in which the locations sought to be forfeited, are situated, a record of the proceedings. If the Notices of Forfeiture were served upon the proper parties, and are correct in form and true in fact, then all the rights of such parties in and to the locations, become forfeited at the expiration of ninety days from the service. Therefore, the only injury to the appellants, by the injunction, is to delay the operation of the forfeiture given by the Acts of Congress, until an investigation can be made by the Court and a determination had as to whether or not forfeiture may be claimed. None of their *rights* are affected, but they are merely delayed

until the Court determines whether they have any rights at all.

Counsel are clearly in error when they insist that unless "copies of the Notices and the Affidavits of service are filed within ninety days, they will be deprived of their right of forfeiture." We have seen that they would not be deprived of their right of forfeiture, if they had such right. ~~The only deposi-~~
~~forfeiture, if they had such right. The only depriva-~~
~~as prima facie evidence in their favor.~~ They could always make the proof of the service of the Notices of Forfeiture by the testimony of the parties who served them, or if necessary to protect them against the death or removal of such parties, they might either procure an affidavit of service, or take testimony *de bene esse* under the Statutes of the U. S. Aside from all this, all that the defendants would need to do would be to obtain a certified copy of the respective complaints filed by the complainants in the District Court of the U. S., for the Southern District of California, wherein it is alleged, under oath, that the service of the Notices was made in September, 1914, and a copy of the Notice is attached to the complaint. No possible injury could result to the defendants from the injunction.

But, again, if they were enjoined by any party from filing copies of the Notices and Affidavits of Service, such party would be clearly estopped from ever asserting that the same were not filed within the proper time. Their failure to file would have been caused by the act of the opposing party in

obtaining an injunction and, therefore, such party would be estopped from even raising or contesting the question as to whether or not they were filed in time.

Denials of Allegations of Complaints.

Counsel seem to claim that inasmuch as some of the allegations of the complaint are denied by the affidavits, they overcome the *prima facie* case made by the complaints and the injunction should have been dissolved. They cite numerous authorities to sustain this position, but they fail to distinguish the principles there laid down, in their application to the case at bar.

The rule that a denial of the equities of the complaint will dissolve an injunction, is one that is seldom, if ever, applied under the present practice, and where it is, the answer or affidavits must contradict *all the material allegations*, and *all the equities* of the complaint. The mere denial of the truth of one allegation in the complaint simply raises an issue as to that allegation, and the resultant decision is necessary before it can be ascertained which of the parties is correct. A case in equity is not tried on complaints and answers and affidavits alone, but upon the issues as formed by them and other evidence introduced in the trial of the case.

The Court will notice in examining the authorities cited by counsel in their brief, that in each and all of them the principle is stated that *all the equi-*

ties and important allegations of the bill must be denied before the rule stated will be enforced. A great many of the allegations and equities of the bill in these cases are not even referred to in the affidavits. Indeed, a denial of such allegations would oust the appellants from any rights in the case. It is positively alleged in the bill, positively verified and not denied in any of the affidavits, for instance, that the complainants in these respective suits, and others, jointly located placer claims in 1910; that each of the plaintiffs is the owner of a one-eighth interest therein; that the defendants served upon them, respectively, in September, 1914, Notices claiming a forfeiture of complainants' interest unless payment was made within ninety days, of the sums demanded in the Notice. None of these allegations are referred to in the affidavits, or in any manner denied.

The complaints also allege that it is impossible to ascertain from the Notices the purposes for which defendant Pack claims to have expended the money stated in the Notices. The affidavit of Mr. Pack does not contradict this allegation and does not seek to explain his Notice of Forfeiture so as to show the inapplicability of the allegations above mentioned.

On page 64 of the record Pack alleges that during the year 1912, he did pay out the sum of \$4,400 "*in connection with and for the purpose of procuring or performing the annual labor upon such 44 placer mining claims hercinbefore referred to and*

more fully described in the bill of complaint on file herein, which sum affiant believes should be properly charged against and constitute a part of the value of the annual assessment work for the year 1912, and which sum affiant believes should be paid or contributed to him by his said co-locators, and that complainants should reimburse affiant for one-eighth of said sum."

Pack then denies the conspiracy; denies that the moneys, for which certain suits were brought, as alleged in the complaint, are to be applied upon the representation; denies that \$2,836 should be applied upon the representation, and alleges upon information and belief that complainants are financially irresponsible "and unable to pay his or any portion of the money expended in doing assessment work on said claims during the year 1912." The affidavit of Schuler is entirely with reference to the Schuler deeds to Schellito and Hutchinson, except that she denies the conspiracy, or any part therein; the affidavit of Hutchinson deals largely with his transaction in procuring the Schuler deed; denies that anything was done by him in conspiracy with the two Tronas Companies and the Foreign Mines Company.

In addition to this, we find in each affidavit an allegation that complainants have a plain, speedy and adequate remedy at law by payment of their proportion of the assessment and demanding and procuring a recordation of a receipt of such payment, and the further allegation that affiant is ir-

reparably injured by complainants' neglect and refusal to pay their proportion of the sums stated in the Notices of Forfeiture within ninety days after the service.

These affidavits are very crude and imperfect, although very skillfully drawn and evidently prepared for the purpose of raising questions and issues upon which none of the affiants desire to make any absolutely positive statement.

Purpose of Injunction to Retain Status Quo.

The main purpose of an injunction *pendente lite* is to hold everything in *status quo*, until a final determination of the suits, so that the Court may, upon entering its decree, do justice between all the parties. In many of the cases cited by counsel for appellants in their brief, it will be noticed that the injunction was refused because it *destroyed* the *status quo*, and in practically each and every case the doctrine is recognized that an injunction will be granted if necessary to retain the *status quo*, that is, retain the facts and the situations of each of the litigants in the exact condition they existed at the time of the filing of the complaint, until the final hearing. This is all we ask in this case. If the appellants had been allowed to file for record copies of the Notices of Forfeiture and affidavits of service, the *status quo*, at the time of the commencement of the suit, would be disturbed and changed. If, upon the final hearing of this case, it is decreed that complainants are indebted to Pack or Hutchinson for any moneys

properly expended by Pack in the representation of the claims described in the bill of complaint, the decree will require payment, by the respective complainants, of their respective shares of such amount of money, and upon default thereof, the Court, by its decree, will declare that their rights are forfeited. Such forfeiture will be more complete and perfect than could be acquired by the mere filing and recording of a copy of the Notice of proof of service. It will be made by decree of a Court of competent jurisdiction and end all litigation in regard to the matter.

It will be noticed that the effort and determination of Judge Bledsoe was to hold the situation in *statu quo* until the final determination of the suit. He indicated his fairness in this regard upon the hearing of the motions to dissolve the injunctions *pendente lite* by restraining the respective complainants from disposing of, encumbering or alienating any of the property described in the complaints until the final determination of the suits. In other words, he made the injunctions reciprocal to which there can be no objection by anyone. (R. p. 85.)

Effect of Doctrine of Lis Pendens.

Counsel assert with much vehemence that by the filing of the complaints, notice was given to the world of the contest involved, and all parties dealing with the title to the property would be bound by the decree and, therefore, no injunction was necessary. They have attempted to support this position

by the citation of some authorities, but an examination of the cases cited disclose that in none of them the conditions presented here were involved. If the pendency of the suits should have satisfied and protected the complainants, how can the appellants be injured by the injunction? But the pendency of the suits would not have protected the plaintiffs to the extent they were entitled, and such protection is given by the injunction. The obvious purpose of the defendants was to file with the County Recorder under Section 14268, C. C. §, the copies of the Notices of Forfeiture and the affidavits of service. By such filing, as we have already seen, a cloud would be cast upon the title of complainants, which would have to be removed in order to make their title clear; in fact, without the injunction against the filing of such papers, the legal effect of the action sought to be enjoined would have been complete. The titles of the complainants would have at least, *prima facie*, passed to the appellants and they would have had the right to deal with the property in any way they pleased.

Even though the pendency of the suit might have been sufficient, it is no reason for dissolving the injunction. The Court below, when it granted the injunction, had the right to give that sort of relief, and there is nothing in the record to show that the lower Court's attention was called to the doctrine of *lis pendens*, or that the same was presented to him or considered by him.

Verification of the Complaints.

Great stress is also laid upon the fact that the complaints are not verified by the complainants themselves, but by one Henry E. Lee. We know of no rule requiring a complaint to be verified by the complainant, if the facts stated in the complaint are sworn to by some person who is acquainted with them. We find nothing in the equity rules of the Supreme Court of the U. S. or in the decisions, to the contrary.

Besides the Court below had no opportunity of passing upon this proposition. It was not even suggested to the Court below, and appellants should be held estopped from raising the question here for the first time.

Conclusion.

We submit that this Court will not hear and determine these appeals as though they were up for final adjudication. The injunctions were merely the result of interlocutory orders based upon the complaint and affidavits, and the Court should not enter into the merits of the case, but only determine whether or not the Court below in granting the injunction abused its discretion, fully lodged in that Court; neither is this the proper time or the proper proceeding for the consideration and determination by this Court of any defect in the method of making the allegations of the complaint or the sufficiency thereof, if the complaint contains positive allegations

properly pleaded sufficient to warrant the Court below in exercising its judicial discretion to grant the injunctions. The correctness of the complaint should be arrived at upon proper motions in the Court below, if the appellants believe that it needs correction.

We submit that the orders appealed from should be affirmed with costs.

R. P. Henshall
H. L. Clayberg
Jno. B. Clayberg
Heller Whitmore

Solicitors for Appellee.

No. 2540

See briefs in 2539
United States

Circuit Court of Appeals

For the Ninth Circuit.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

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Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
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Filed

JAN 23 1915

F. D. Monckton,

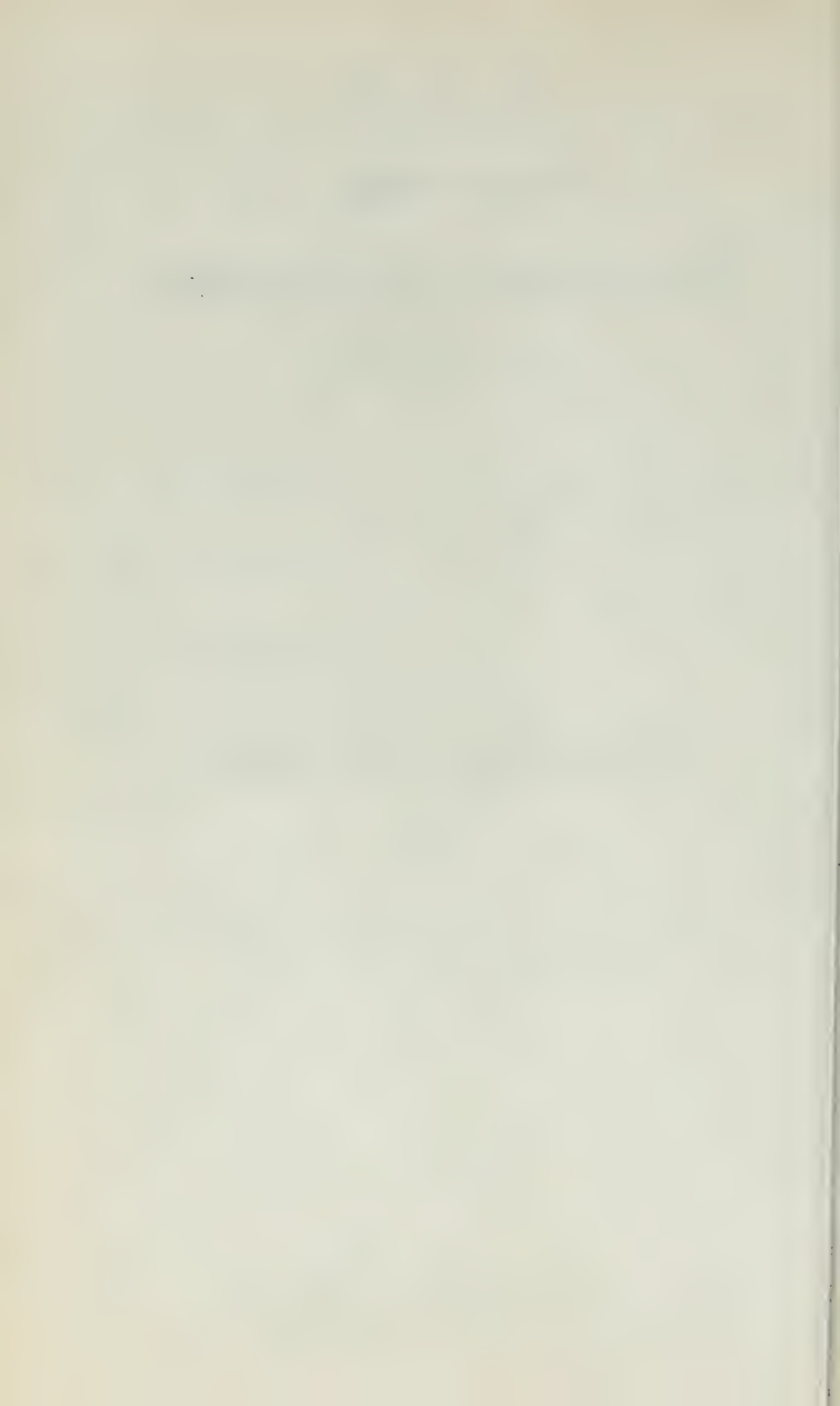
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,
Appellants,
vs.
E. THOMPSON,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.



INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellants:

JOS. K. HUTCHINSON, Esq., 923 First National Bank Building, San Francisco, California; and

CHAS. W. SLACK, Esq., 923 First National Bank Building, San Francisco, California.

For Appellee:

H. L. CLAYBERG, Esq., 937 Pacific Building, San Francisco, California;

MESSRS. CLAYBERG & WHITMORE, 937 Pacific Building, San Francisco, California and

R. P. HENSHALL, Esq., Los Angeles, California. [3*]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss:

The President of the United States, to E. THOMPSON, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern District of California, Southern Division, wherein Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, are appellants, and you are appellee,

*Page-number appearing at foot of page of original certified Record.

to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable BENJAMIN F. BLEDSOE, United States District Judge for the Southern District of California, this 26 day of December, A. D. 1914.

BENJAMIN F. BLEDSOE,
United States District Judge. [4]

Due service and receipt of a copy of the within Citation on Appeal this 28th day of December, 1914, hereby admitted.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Solicitors for Complainant.

[Endorsed]: No. B. 55—Eq. United States District Court, for the Southern District of California. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee. Citation on Appeal. Filed Dec. 29, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants. [5]

*In the District Court of the United States, Southern
District of California, Southern Division.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Bill in Equity.

Now comes the above-named complainant and for cause of action against defendants above named complains and alleges:

That complainant is now, and at all times hereinafter stated, was a citizen of the United States and of the State of New Jersey, and a resident of the State of New Jersey; that the defendants Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, and each of them, now are, and at all times hereinafter mentioned were citizens of the United States

and of the State of California, and residents of the State of California; that the amount in controversy between the plaintiff and defendants herein in this action exceeds, exclusive of costs and interest, the sum of Three Thousand Dollars (\$3,000); that the real estate and placer mining claims affected by this suit are situate in San Bernardino County, State of California, that neither the said complainant nor the said defendants, or either of them, are now, nor for a long time prior to the commencement of this suit, have they or either of them been in the actual possession of the said placer mining claims, hereinafter particularly described. [6]

I.

That during the year 1910, plaintiff jointly with one H. C. Fursman, W. Huff, H. A. Baker, R. Waymire, P. Perkins, D. Smith and defendant, Thos. W. Pack, duly located and recorded forty-four certain placer mining claims, hereinafter more particularly described, situate in and upon Searles Borax Lake, County of San Bernardino, State of California; that plaintiff is now, and ever since the date of said locations, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims and each of them; that the said forty-four placer mining claims above referred to are more particularly described, named and numbered as follows, and are more fully described in said notices of locations, copies whereof are recorded in the office of the County Recorder of San Bernardino County, State of California, in Volume 82 of Mining Records, at the pages of said volume hereinafter designated fol-

lowing the respective names of said placer mining claims, to wit:

- "The Soda No. 1 Placer Mining Claim," at page 131 thereof;
- "The Soda No. 2 Placer Mining Claim," at page 131 thereof;
- "The Soda No. 3 Placer Mining Claim," at page 132 thereof;
- "The Soda No. 4 Placer Mining Claim," at page 132 thereof;
- "The Soda No. 5 Placer Mining Claim," at page 133 thereof;
- "The Soda No. 6 Placer Mining Claim," at page 133 thereof;
- "The Soda No. 7 Placer Mining Claim," at page 134 thereof;
- "The Soda No. 8 Placer Mining Claim," at page 134 thereof;
- "The Soda No. 9 Placer Mining Claim," at page 135 thereof;
- "The Soda No. 10 Placer Mining Claim," at page 135 thereof;
- "The Soda No. 11 Placer Mining Claim," at page 136 thereof;
- "The Soda No. 12 Placer Mining Claim," at page 136 thereof;
- "The Soda No. 13 Placer Mining Claim," at page 137 thereof;
- "The Soda No. 14 Placer Mining Claim," at page 137 thereof;

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- "The Soda No. 15 Placer Mining Claim," at page 138 thereof;
- "The Soda No. 16 Placer Mining Claim," at page 138 thereof;
- "The Soda No. 17 Placer Mining Claim," at page 139 thereof;
- "The Soda No. 18 Placer Mining Claim," at page 139 thereof;
- "The Soda No. 19 Placer Mining Claim," at page 140 thereof;
- "The Soda No. 20 Placer Mining Claim," at page 140 thereof;
- "The Soda No. 21 Placer Mining Claim," at page 141 thereof;
- "The Soda No. 22 Placer Mining Claim," at page 141 thereof;
- "The Soda No. 23 Placer Mining Claim," at page 142 thereof;
- "The Soda No. 24 Placer Mining Claim," at page 142 thereof;
- "The Soda No. 25 Placer Mining Claim," at page 143 thereof;
- "The Soda No. 26 Placer Mining Claim," at page 143 thereof;
- "The Soda No. 27 Placer Mining Claim," at page 144 thereof;
- "The Soda No. 28 Placer Mining Claim," at page 144 thereof;
- "The Soda No. 29 Placer Mining Claim," at page 145 thereof;
- "The Soda No. 30 Placer Mining Claim," at page 145 thereof;
- "The Soda No. 31 Placer Mining Claim," at page 146 thereof;
- "The Soda No. 48 Placer Mining Claim," at page 154 thereof;
- "The Soda No. 49 Placer Mining Claim," at page 155 thereof;
- "The Soda No. 50 Placer Mining Claim," at page 155 thereof;

"The Soda No. 67 Placer Mining Claim," at page 164 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 73 Placer Mining Claim," at page 167 thereof;
"The Soda No. 86 Placer Mining Claim," at page 173 thereof;
"The Soda No. 92 Placer Mining Claim," at page 176 thereof;
"The Soda No. 93 Placer Mining Claim," at page 177 thereof;
"The Soda No. 113 Placer Mining Claim," at page 187 thereof;
"The Soda No. 114 Placer Mining Claim," at page 187 thereof;
"The Soda No. 130 Placer Mining Claim," at page 195 thereof;
"The Soda No. 218 Placer Mining Claim," at page 218 thereof;
[8]

II.

That during the month of September, 1914, the above-named defendants caused to be served upon plaintiff, a paper which purports to be a notice of forfeiture, a copy of which said so-called "Notice of Forfeiture" is hereto attached, marked Exhibit "A" and made a part hereof. That in and by said pretended Notice of Forfeiture it appears that all of plaintiff's right, claim, title and interest in and to the said forty-four above described placer mining claims, and each thereof, will be forfeited and a cloud cast upon plaintiff's title thereto within ninety days from the date of service of said so-called Notice of Forfeiture upon this plaintiff, unless plaintiff, within said ninety days, pays to defendants or to defendant, Joseph K. Hutchinson, for said defendants, the sum of \$550.00, claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack upon said claims in the year 1912 as recited in said pretended notice of forfeiture. (Exhibit "A").

III.

Plaintiff alleges that the said defendant, Thos. W.

Pack, did not expend, or cause to be expended, during the year 1912, or during any other year, or at any other time, or at all, the sum of \$4,400.00, or any part or portion thereof, or any other sum or sums or any sum at all of his own money or funds upon said forty-four above described placer mining claims, or upon any of them, or upon any placer mining claim or claims located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest, in the County of San Bernardino, State of California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all. Plaintiff further alleges that the said Thos. W. Pack did not expend or cause [9] to be expended, during the year 1912, or during any other year, or at any other time, or at all, the sum of \$100.00 or any part or portion thereof, of his own money or funds, or any other sum or sums, or any sum at all, upon each, or upon any or all of said above described forty-four placer mining claims, or upon any placer mining claim or claims, located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest in the County of San Bernardino, State of California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all.

IV.

That said pretended Notice of Forfeiture does not in any way, describe the kind, character or nature of the pretended labor and improvements, or labor or

improvements, claimed to have been done and performed upon said claims, or any of them, during the year 1912, by the said Thos. W. Pack.

That plaintiff is unable to ascertain from said pretended Notice of Forfeiture whether the said defendant Pack claims to have actually expended, of his own money or funds, in labor and improvements, or in labor or improvements, upon each of said placer mining claims, the said sum of \$100.00, or the sum of \$4,400.00 upon all of them, or any other sum or amount, or whether the said defendant Pack claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon each and all of said placer mining claims the annual representation work for the year 1912; that plaintiff cannot ascertain from the said pretended Notice of Forfeiture whether the amounts claimed to have been expended by said defendant Pack of his own money or funds upon said placer mining claims, or upon any of them, if he ever expended any money at all [10] thereon, was the value of \$100.00 for each claim, or of the value of \$4,400.00 for all, or whether such labor and improvements, or labor or improvements increased the value of each of said claims in the sum of \$100.00, or the value of them all in the sum of \$4,400.00, or whether said pretended labor and improvements, or labor or improvements, tended in any way to develop any or all of said placer mining claims, or increased or aided in availability for taking ores or minerals from said claims, or from any of them; that this plaintiff further alleges upon in-

formation and belief that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims, or any of them, for the year 1912, expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said placer mining claims are located, as aforesaid, and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said Searles Borax Lake for the purpose of performing said representation work during said year upon said claims.

That said pretended Notice is executed, made and signed by defendants Thos. W. Pack, S. Schuler and Joseph K. Hutchinson; that the same discloses upon its face that neither the said Schuler or the said Hutchinson, or either, or both of them, had any interest or ownership in or to the said placer mining claims mentioned therein, or in or to any part or portion of them, during the year 1912, or during the time it is claimed Thos. W. Pack expended money for labor and improvements thereon, and that neither the said S. Schuler, or the said Joseph K. Hutchinson ever expended, or caused to be expended the money named in said pretended Notice of Forfeiture, or any money thereon; [11]

V.

That on or about the 25th day of December, 1913, defendant S. Schuler made, executed, acknowledged and delivered her deed and conveyance to one J. A. Shellito, whereby she transferred and conveyed to

said J. A. Shellito all of her right, title and interest in and to said above described placer mining claims, together with her right, title and interest in and to certain other placer mining claims therein described; that thereafter and on or about the 14th day of January, 1914, the said defendant Schuler assumed to convey to defendant Hutchinson the same interest and property that she, the said defendant Schuler, had theretofore conveyed to the said J. A. Shellito, as hereinabove alleged; that the said defendant Hutchinson, at the time of receiving said conveyance was fully informed and had full knowledge that the said defendant Schuler had conveyed all the rights, interests, claims and property therein described to the said J. A. Shellito, a long time prior to the execution of said conveyance by said Schuler to said Hutchinson; that plaintiff further alleges that the said Hutchinson took said conveyance from the said defendant Schuler for the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or for all or a part of them, and not for his own use and benefit, and in pursuance of a combination and conspiracy by and between these defendants in this suit and the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, wherein and whereby the said defendants, and the said above-named corporations confederated and combined together to injure plaintiff and to deprive and defraud him of all his right, title and interest in and to said above-described placer mining claims.

VI.

Plaintiff further alleges upon his information and belief that the pretended transfer of the said one-eighth interest of the said Thos. W. Pack in and to these said above-described claims by the said S. Schuler to the said Joseph K. Hutchinson, if such transfer was made at all, as set forth in said pretended Notice of Forfeiture, was made and done pursuant to and in order to carry out a combination and conspiracy to injure plaintiff and to deprive and defraud him of all of his right, title and interest in and to said placer mining claims and each and all of them; that the said pretended transfer to the said Joseph K. Hutchinson by the said S. Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration; that if any consideration at all was paid by the said Joseph K. Hutchinson to the said S. Schuler for the said transfer, the same was advanced and paid by the Foreign Mines and Development Company, a corporation, or by the American Trona Company, a corporation, or by the California Trona Company, a corporation, or by part or all of them, or by some person or persons authorized by them, or part or all of them, or acting for them, or for part or all of them, and on their behalf, or on the behalf of part or all of them; that the said Joseph K. Hutchinson took the title to the said one-eighth interest in and to these said above-described claims, if he took the title at all, for the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for

part or all of them, and not for his own use and benefit; that the said Joseph K. Hutchinson now claims to hold the said title to the said one-eighth interest in and to the said above described claims, if such title ever passed to him, for the sole and only use and benefit of the said Foreign Mines and Development Company, the said American Trona Company, the said California [13] Trona Company, or for the sole use and benefit of part or all of them, and not for his own use and benefit.

Plaintiff further alleges that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company claim rights and interest in and to the mineral lands covered by said placer locations so made and recorded by plaintiff and others, as hereinabove alleged, and that said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by plaintiffs and others, as hereinabove alleged, and that the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have, and each and every of them has, as plaintiff is informed and believes, fraudulently attempted to procure the right, title and interest of defendant, Pack, in and to said locations so made by plaintiff and others as hereinabove alleged, for the express purpose, and none other, of using the said interest of the said Pack in and to said locations, in such a way and manner as to destroy all of plaintiff's rights and interest therein, and to defraud this

plaintiff out of all interest in and to said claims, and each of them; this plaintiff further alleges on like information and belief that the defendant, Joseph K. Hutchinson, has been acting as the agent, representative and attorney of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, in endeavoring to deprive and defraud plaintiff of his rights and title in and to said placer mining locations, as above alleged; that the said defendant, Joseph K. Hutchinson, under the direction and orders of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, fraudulently obtained said transfer of the said one-eighth interest in and to said placer [14] mining claims, if he obtained said transfer at all, from defendant Schuler, in pursuance to the combination and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, and the said defendants herein, and each of them, to injure plaintiff and defraud and deprive him of all of his right, title and interest in and to said claims, and each of them; that in further pursuance of said combination and conspiracy, and under the orders and direction of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, said defendant Joseph K. Hutchinson, and the said defendants Schuler and Pack, caused to be served

upon plaintiff the pretended Notice of Forfeiture above described (Exhibit "A"); that the fraudulent transfer of the said one-eighth interest in and to said claims by the said defendant Schuler to the said defendant Hutchinson, if any transfer was made at all, and the serving of the said pretended Notice of Forfeiture upon the said plaintiff as aforesaid, was all done in pursuance to and in the carrying out of a combination and conspiracy entered into by and between the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, and the said defendants, and each of them, confederated together for the purpose of injuring plaintiff and depriving and defrauding him of all his right, title and interest in and to said placer mining claims above described.

VII.

Plaintiff further alleges upon his information and belief that the said pretended Notice of Forfeiture was prepared and served upon him pursuant to and in the furtherance of such combination and conspiracy between the defendants herein and the said [15] Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and that the said Thos. W. Pack, never, during the year 1912, or at any other time, expended or caused to be expended, the sum of \$4,400.00 of his own funds or money, or any other sum or amount in and upon said claims, or upon one, or any of them, for any purpose whatsoever, and that neither he nor any of the defendants herein, or their

co-conspirators are entitled to any contribution from plaintiff in any sum or amount whatsoever.

VIII.

That plaintiff is informed and believes that none of the money defendant Pack claims to have expended as and for representation work, or for labor and improvements, or labor or improvements, on the above described claims, or any thereof, if expended by the said Pack at all, was expended by him for the actual representation and assessment work upon the said claims, or any of them, as required by law; but plaintiff alleges that defendant Pack paid the moneys set forth in the said pretended Forfeiture Notice, if he paid any money at all, for certain goods, wares and merchandise, furnished to certain laborers, employed by plaintiff and his co-locators doing assessment work on said claims in the years 1911 and 1912, and for automobile hire in transporting said laborers and supplies to and from said placer mining claims.

IX.

That on the 14th day of January, 1913, one W. W. Colquhoun, through his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit against defendant Pack, one Henry E. Lee and one T. O. Toland, in the Superior Court of the State of California, in and for the City and County of San [16] Francisco, which said suit is entitled "W. W. Colquhoun, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, a co-partnership, and Thos. W. Pack, Henry E. Lee and T. O. Toland, as individ-

uals, Defendants, and numbered 46604 in the records of the Superior Court of the City and County of San Francisco, State of California; that in the verified complaint in said suit plaintiff, W. W. Colquhoun, alleges that he is the assignor of C. J. and E. E. Teagle, and that the sum of \$750.00 is due him for certain goods, wares and merchandise sold and delivered to the said Pack and the other two defendants named in said suit, during the years 1911 and 1912, and that the same had never been paid. This plaintiff alleges upon information and belief that the said goods sued for in said action were purchased by said Pack from C. J. and E. E. Teagle, in the town of Johannesburg, Kern County, California; that the whole amount of said goods, wares and merchandise so purchased by the said Pack from the said Teagles was the sum of \$969.00 and that the said Teagles admit that the sum of \$219.00 has been paid upon said account; that this plaintiff further alleges upon his information and belief that the said sum of \$750.00, sued for in said action, constitutes part of the amount which the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff and threatening a forfeiture of his rights and interests in and to said above described placer mining claims, upon his failure so to contribute, as recited in their said pretended Notice of For-

feiture; that on the 4th day of February, 1914, a judgment was rendered in said suit against the said Pack, in favor of plaintiff, in the whole amount sued for, which said judgment [17] is now standing of record, and docketed in Volume No. 29 of Judgments at page 484 of the records of the County Clerk of the City and County of San Francisco, State of California, and has never been satisfied or discharged, either in whole or in part, or set aside, vacated or modified.

X.

That on the 20th day of January, 1913, one M. A. Varney, by his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit in the Superior Court of the City and County of San Francisco, State of California, against defendant Thos. W. Pack, one Henry E. Lee and one T. O. Toland, which said suit was entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, and Thos. W. Pack, Henry E. Lee and T. O. Toland, a co-partnership, Defendants," and numbered 46692 in the records of the said Superior Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and rendered services to defendant Thos. W. Pack and the other defendants therein, in the sum of \$4,180.00, of which said sum only \$535.00 had been paid; that thereafter and on or about the 4th day of February, 1913, a judgment was entered in said action against the said Thos. W. Pack, in favor of plaintiff, in the whole amount sued

for. That plaintiff is informed and believes and therefore alleges the fact to be that said judgment in said suit is still standing of record and has never been satisfied, set aside, vacated or modified. That plaintiff is informed and believes and therefore alleges the fact to be that the last above named action was brought by the said M. A. Varney to recover the sum of \$4,180.00 from the said Thos. W. Pack, Henry E. Lee and T. O. Toland, for the use of two certain automobiles and certain [18] supplies furnished by the said M. A. Varney to the said Thos. W. Pack, at his special instance and request, in the years 1911 and 1912, and used by the said Thos. W. Pack to transport men hired by plaintiff and his co-locators to do the annual assessment work on said above described placer claims for said years, and supplies for said men, from the City of Los Angeles and elsewhere to the above described placer claims on Searles Borax Lake, San Bernardino County, California; that plaintiff alleges upon his information and belief that the said sum of \$4,180.00 sued for in said action, constitutes part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1912 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff, and threatening a forfeiture of his rights and interests to and to said above described placer claims upon

his failure so to contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A").

XI.

That on the 2d day of September, 1913, one W. W. Colquhoun, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack, filed a suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against this plaintiff and H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith and S. Schuler, to recover the sum of \$750.00 alleged to be due said plaintiff for the value of certain goods, wares and merchandise, which said suit is entitled in said Superior Court, "W. W. Colquhoun, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a copartnership, [19] and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals, Defendants," and numbered 50723 in the files and records of the said Superior Court; that in his verified complaint in said suit the said W. W. Colquhoun alleges that C. J. and E. E. Teagle assigned to him the said claims sued upon in said action; he further alleges that during the years 1911 and 1912 the said C. J. and E. E. Teagle furnished certain goods, wares and merchandise of the value of \$750.00 to defendants therein, including this plaintiff, and that no part of said sum had been paid; that plaintiff herein alleges the fact to be that said suit was brought by plaintiff for the value of the said goods, wares and merchandise claimed to have been sold

and delivered by plaintiff's assignors to Thos. W. Pack in the years 1911 and 1912, and it is claimed that the same were used by a camp of men doing assessment work upon the claims hereinabove described, together with other placer mining claims, during the years 1911 and 1912; that the whole amount of the value of said goods, so alleged to have been sold was \$969.00, but that the said plaintiff in said suit admitted the payment of the sum of \$219.00 on account. That thereafter and on or about the 27th day of October, 1913, R. Waymire filed his verified answer to the complaint in said action; that thereafter a trial was had of the issues therein, and after judgment had been entered against R. Waymire, the said Court on the 11th day of August, 1914, granted the motion of R. Waymire for a new trial thereof; that plaintiff in said suit, as this plaintiff is informed and believes, is now prosecuting an appeal from the order of said Court granting the said motion for a new trial. That plaintiff alleges upon his information and belief that the said sum of \$750.00 sued for in said action, and the sum of \$219.00 admitted to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their [20] said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1912 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which by the said Pack, the said defendants are now seeking contribution from this plaintiff, and threatening a forfeiture of his rights and interests in and to

said above described claims upon his failure to so contribute, as recited in their said pretended Notice of Forfeiture.

XII.

That on the 30th day of August, 1913, one M. A. Varney, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack filed a suit in the Superior Court of the City and County of San Francisco, State of California, against H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith, S. Schuler and this plaintiff, which said suit is entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals, Defendants," and numbered 50724 in the files and records of the said Superior Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and rendered services to the defendants therein in the sum of \$4,170.00, of which said sum only \$500.00 has been paid; that plaintiff alleges the fact to be that the said action was brought by the said M. A. Varney to recover the sum of \$3,670.00 from the said defendants for the use of two certain automobiles and certain supplies furnished by the said M. A. Varney to the said Pack at his special instance and request, in the years 1911 and 1912 and used by the said Pack to transport [21] men and supplies

from the City of Los Angeles and elsewhere to the above described claims on Searles Borax Lake, San Bernardino County. California.

That thereafter and on or about the 20th day of October, 1913, R. Waymire filed his verified answer to the Complaint in said action; that thereafter various proceedings were had therein and a trial thereof was had before the court, and that on or about the 16th day of July, 1914, R. Waymire moved the Court for a nonsuit in said action, which motion for nonsuit was by the Court granted; that on or about the 7th day of October, 1914, judgment was entered in favor of R. Waymire, which said judgment is now of record in the office of the Clerk of said Superior Court in Volume 77 of Judgments at page 93 thereof. That this plaintiff alleges upon his information and belief that the said sum of \$3,670.00, sued for in said action, and the sum of \$500.00 alleged to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1912 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which, by the said Pack, the said defendants are now seeking contribution from this plaintiff, and threatening to forfeit all of plaintiff's rights, title and interest in and to said placer mining claims, if he does not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A").

XIII.

That on or about the 26th day of February, 1914, one Raphael Mojica filed an action in the Superior Court in the City and County of San Francisco, State of California, against this plaintiff, his co-locators and defendant S. Schuler, as assignee of the defendant Pack, one Henry E. Lee and various other parties to [22] recover the sum of \$1,443.50, which said action is entitled "Raphael Mojica, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, a copartnership, H C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, an association, and Henry E. Lee, Thomas O. Toland, H. C. Fursman, W. Huff, Rudolph Waymire, P. Perkins, H. A. Baker, E. Thompson, Dudley Smith, Stella Schuler, John Doe, Jane Roe, Richard Roe and Mary Roe, Defendants," and is numbered 54989 in the files and records of said Superior Court; that in his verified complaint in said action the said plaintiff pretends to be the assignee of thirty certain Mexican laborers, and pretends therein that each of these said Mexican laborers named therein had assigned to him their claims against the defendants therein for doing certain labor and work, in and upon the above described placer claims by way of assessment work thereon, during the year 1912; that said action is now at issue in said Superior Court; that plaintiff is informed and believes and therefore alleges the fact to be that the said sum of \$1,443.50 sued for in said action constitutes a portion of the amount the said de-

fendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1912 for doing the assessment work on the above described placer mining claims and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff, and threatening to forfeit all of plaintiff's right, title and interest in and to said placer mining claims if he does not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A"); that plaintiff is informed and believes that no part of said sum of \$1,443.50 sued for in said action has been paid by the said Thos. W. Pack, or by anyone whomsoever for him.

[23]

XIV.

That a short time prior to the dates when the said defendant Thos. W. Pack claims to have expended money for the purpose of doing assessment work on the above described placer mining claims, as claimed in defendants' pretended Notice of Forfeiture (Exhibit "A"), one Henry E. Lee, as the duly authorized agent and representative of this plaintiff, and of his co-locators, paid to the said defendant, Thos. W. Pack, for this plaintiff, and for his said co-locators, in their respective proportionate shares, the sum of \$1,000.00, as a portion of their *pro-rata* contribution for the doing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said actual assessment work thereon; that as plaintiff is informed and believes the said Thos. W. Pack, did

so use the said sum of \$1,000.00 for said purpose in said year and that the said amount should be credited to this plaintiff and his co-locators in proportion to their respective interests in the said placer mining claims.

XV.

That plaintiff further alleges that during the year 1911, and prior to the time any money is claimed to have been expended by the said defendant Pack in his said pretended Notice of Forfeiture (Exhibit "A"), the said defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of plaintiff, and his co-locators, in the sum of \$1,836.00, and that the said Henry E. Lee, acting as such agent for plaintiff and his co-locators, directed the said defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of the placer mining claims hereinabove described in said pretended Notice of Forfeiture (Exhibit "A") for the years 1911 and 1912, and that the [24] said defendant Pack agreed with the said Henry E. Lee that he would so utilize and use said money; that plaintiff claims that said sum of \$1,836.00 is and should be a portion of the money expended by the said defendant Pack, as described in the said pretended Notice of Forfeiture (Exhibit "A"); that the said money and indebtedness was money due and owing to this plaintiff and his co-locators from the said defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to the said Henry E. Lee, the duly au-

thorized agent of this plaintiff and his co-locators, and that said amount should be credited to this plaintiff and his co-locators in proportion to their respective interests in their said placer mining claims.

XVI.

Plaintiff further alleges that simultaneously with the service of said pretended Notice of Forfeiture (Exhibit "A") upon plaintiff, the said defendants served upon plaintiff another pretended Notice of Forfeiture, by the terms of which the said defendants claim that the defendant Pack expended during the years 1911 and 1912, the sum of \$5,600.00 for labor and improvements upon one hundred and seventy-five placer claims, among which are included the placer claims in said Exhibit "A," and hereinbefore in this complaint described; that by the terms of said pretended Notice of Forfeiture, so served upon plaintiff simultaneously with the service of said Exhibit "A," as aforesaid, the said defendants claim contribution from this plaintiff twice for the same money and twice for the representation of the placer claims in this complaint specifically described.

XVII.

Plaintiff has no means of knowing or of ascertaining what, if any, amount of his own money or funds said defendant has expended [25] on said placer mining claims, or upon any of them, for annual representation work for the year 1912, and that the only method whereby plaintiff can procure said information is through this Court and by its order compelling the defendant, Thos. W. Pack, to account for and disclose any and all moneys expended or spent

by him upon said placer mining claims, above described, or upon any of them, during the year 1912, for the purpose of representing same, and each and all thereof, for said year, if any money at all was so expended by the said Thos. W. Pack for such purpose, and whose money, if any, was expended by him, how expended, and what amount of the same, if any, was so expended and spent for labor and improvements or labor or improvements upon the above described claims, or upon any of them, which could lawfully be counted, considered or applied as such representation work, and for the expenditure of which he would be entitled to *pro rata* contribution from this plaintiff.

XVIII.

Plaintiff hereby and herewith offers and stands ready to pay to the said Thos. W. Pack, or these defendants, or either of them, his proportionate share of any moneys belonging to the said defendant Thos. W. Pack which this Court finds were expended by the said Thos. W. Pack on the above described claims, or any of them, as actual representation work thereon for the year 1912, if the Court finds he so expended any money at all for such purpose.

XIX.

That plaintiff further alleges that if the said defendants are allowed to proceed under said pretended Notice of Forfeiture (Exhibit "A") they will, at the expiration of ninety days from and after the date of the service of the said pretended Notice of Forfeiture, file and record a copy of said Notice of Forfeiture [26] (Exhibit "A") and an affidavit of

service, with the County Recorder of San Bernardino County, California, and claim and assert that all the right, title and interest of this plaintiff in and to said placer claims, and each and all thereof, has been duly and legally forfeited and extinguished and thereby and by means thereof a cloud will be cast upon the title and interest of this plaintiff in and to said placer mining claims, and each of them, and plaintiff be compelled to institute and prosecute a great number of suits to remove said cloud, at a great and exorbitant expense; that unless defendants are enjoined and restrained from proceeding to declare the forfeiture of plaintiff's rights in and to said placer claims and each of them as claimed in their said Notice of Forfeiture (Exhibit "A") this plaintiff will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the clouds cast upon his said title and interest in and to each of said placer mining claims.

XX.

That plaintiff has no plain, speedy or adequate remedy at law in the premises, and unless defendants, and each of them, are restrained and enjoined from declaring a forfeiture of all of plaintiff's right, title and interest in and to said claims, and each thereof, pursuant to and in accordance with the pretended Notice of Forfeiture (Exhibit "A"), plaintiff will be irrevocably and irreparably damaged and injured, and be defrauded or deprived of all his right, title and interest in and to said placer mining claims, and each of them.

WHEREFORE plaintiff prays:

1. For a decree of this Court preventing any forfeiture of any [27] right, title, interest or claim of this plaintiff in and to said placer mining claims above described, and in and to each and all of them.

2. For a decree of this Court directing said defendants, and each of them, to account and disclose to this plaintiff, and to this Court, for all moneys, if any, belonging to the said Pack and constituting his own personal funds, and used and expended by him in procuring labor or improvements, or labor and improvements, which could be legally counted, considered or claimed as a representation or annual assessment work for the year 1912, on the above described placer mining claims, and on each of them, and that this Court ascertain and determine the amount, if any, thereof, and the proportion, if any, which this plaintiff should pay.

3. That these defendants, and each of them, their agents, attorneys, servants and employees be permanently restrained and enjoined from taking any steps to perfect or establish any forfeiture of plaintiff's rights, titles and interests in or to said placer mining claims, hereinabove described, or in or to any part or portion thereof, or any of them, and that in the meantime during the pendency of this suit, and until the final determination thereof on the merits, said defendants, and each of them, their attorneys, agents, servants, representatives or employees, and each and all of them, be restrained and enjoined from taking any steps to cast a cloud upon the title, or to forfeit or to perfect or establish any forfeiture

of plaintiff's rights, titles or interests in or to said placer mining claims hereinabove described, or any part or portion thereof, or any of them.

4. For plaintiff's costs of *siut*.

5. For such other and further relief as this Honorable Court may deem just and equitable in the premises.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Complainant. [28]

*In the District Court of the United States, Southern
District of California.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

State of California,

City and County of San Francisco,—ss.

Henry E. Lee, being first duly sworn upon his oath says:

That he has read the complaint in the above-entitled action to which this affidavit is attached, and knows the contents thereof; that he has personal knowledge of all the facts and matters therein alleged, and knows them to be true, except as to those matters therein alleged upon information and belief, and as to them, he believes them to be true.

That he makes this affidavit for the plaintiff and

on his behalf, for the reason that the said plaintiff is not a resident of the City and County of San Francisco, State of California, and is not at the date of the making of this affidavit within said State of California, or within the City and County of San Francisco wherein this affiant resides and has his office and place of business.

HENRY E. LEE,

Subscribed and sworn to before me this 21st day of November, 1914.

[Seal]

H. B. DENSON,

Notary Public in and for the City and County of San Francisco, State of California. [29]

Exhibit "A" [to Bill in Equity].

NOTICE OF FORFEITURE.

710 Claus Spreckels Building,

San Francisco, California, September 14th, 1914.

E. THOMPSON:

You are hereby notified that I, the undersigned, T. W. PACK, expended during the year 1912 the sum of Forty-four Hundred Dollars (\$4400), in amounts of One Hundred Dollars (\$100), for labor and improvements, upon each of the forty-four (44) following described placer mining claims:

Those certain placer mining claims situate in and upon Searles Borax Lake, County of San Bernardino, State of California, more particularly named and numbered as follows:

"The Soda No. 1 Placer Mining Claim, to and including "The Soda No. 31 Placer Mining Claim," location notices of which said claims are recorded in

Volume No. 82 of Mining Records of said County of San Bernardino, State of California, on pages numbered 131 to 146 inclusive, of said volume;

“The Soda No. 48 Placer Mining Claims,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 154 of said volume.

“The Soda No. 49 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino; State of California, at page number 155 of said volume;

“The Soda No. 50 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 155 of said volume; [30]

“The Soda No. 67 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 164 of said volume;

“The Soda No. 70 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 165 of said volume;

“The Soda No. 73 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Ber-

nardino, State of California, at page number 167 of said volume;

“The Soda No. 86 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page 173, of said volume;

“The Soda No. 92 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 176 of said volume;

“The Soda No. 93 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 177 of said volume;

“The Soda No. 113 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 187 of said volume;

“The Soda No. 114 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 187 of said volume; [31]

“The Soda No. 130 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 195 of said volume;

“The Soda No. 218 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 218 of said volume.

You are hereby further notified that said sum of \$4400 (being \$100 for each of said claims) was expended by me for the purpose of complying with the requirements of Section 2324 of the Revised Statutes of the United States and amendments thereof, concerning the performance of annual labor upon mining claims.

You are hereby further notified that the amount of \$100 was the amount required to hold each of said claims for the said year ending December 31st, 1912, and that said sum of \$4400 was the aggregate amount required to hold said forty-four claims for said year 1912.

You are hereby further notified that throughout said year of 1912 I was the owner of an undivided one-eighth interest in said claims and therefore a co-owner with you throughout said period, during which you also were the owner of an undivided one-eighth interest in said claims.

You are hereby further notified that subsequent to the making of said expenditures I transferred my said one-eighth interest to S. Schuler, and that she has transferred said one-eighth interest to Joseph K. Hutchinson, who is now the owner thereof.

You are hereby further notified that I, T. W. Pack, together with said S. Schuler, and said Joseph K. Hutchinson, also undersigned, having received no

contribution from you for your proportion, to wit: one-eighth, of said expenditures, do, and each of us does hereby make demand upon you for contribution by you of [32] your proportion of said expenditures, to wit: of the sum of \$550, or one-eighth of said sum of \$4400.

You are hereby further notified that if, within ninety (90) days from the personal service of this notice upon you, you fail or refuse to contribute your proportion of said expenditure, to wit: \$550, or one-eighth of said sum of \$4400, by payment of the same to said Joseph K. Hutchinson, at Room 710, Claus Spreckels Building, City and County of San Francisco, State of California, he being duly authorized to collect said money and receipt for the same, your said interest in said mining claims, and each of them, will become the property of the undersigned.

Dated, San Francisco, California, September 14, 1914.

(Signed) S. SCHULER,
T. W. PACK,
JOSEPH K. HUTCHINSON. [33]

[Indorsed]: No. B. 55-Eq. U. S. District Court, Southern District California, Southern Division. In Equity. E. Thompson, vs. Thomas W. Pack, Stella Schuler, Joseph K. Hutchinson. Bill in Equity. Filed Nov. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Building, San Francisco. Attorneys for Complainant. [34]

*In the District Court of the United States, Southern
District of California, Southern Division.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Restraining Order and Order to Show Cause.

WHEREAS, plaintiff above named has filed his verified bill in equity in the above entitled cause against the defendants above named praying for certain equitable relief and an order of this Court restraining and enjoining defendants and each of them, during the pendency of this suit and until the final determination thereof upon its merits, from in any way or manner casting a cloud upon the title of or taking any steps toward forfeiting or declaring forfeited any of plaintiff's right, title or interest in and to certain placer mining claims in said bill of complaint and hereinafter fully described, named and numbered; and

WHEREAS, upon a reading of plaintiff's said bill of complaint it satisfactorily appears to the Court therefrom that plaintiff may suffer irreparable and irrevocable damage and injury, before the hearing of the order to show cause hereinafter set forth, unless, pending the hearing on said order to show cause, said defendants and each of them are by this

Court restrained as hereinafter set forth, and other good cause appearing,

NOW THEREFORE, IT IS HEREBY ORDERED that you, the said defendants, [35] Thos. W. Pack, S. Schuler and Jos. K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees, are hereby specially restrained and enjoined from in any way or manner taking any steps toward forfeiting or declaring a forfeiture of plaintiff's right, title and interest in and to certain hereinafter described placer mining claims, and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date hereof, served upon plaintiff herein, a copy of which is attached to the said bill of complaint and marked Exhibit "A," until the hearing of the application of plaintiff for an injunction *pendente lite* in this cause, which said application is hereby set for hearing before this Court on the 7th day of December, 1914, or until the further order of this Court;

IT IS FURTHER ORDERED that you and each of you appear before this Court at 10:30 o'clock A. M. on the 7th day of December, 1914, at the courtroom of Division No. 2 of the District Court of the United States for the Southern District of California, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, and then and there to show cause, if any you have, why said restraining order, as hereinabove made, should not be made permanent during the pendency of this suit and until the final determination thereof on its merits.

Said placer mining claims above named are described, numbered and named as follows, being situate on Searles Borax Lake, County of San Bernardino, State of California, the location notices of which said placer claims are recorded in Volume 82 of Mining Records in the office of the County Recorder of the said County of San Bernardino, State of California, at the following respective pages of said Volume 82 set down opposite and following the hereinafter described, named and numbered placer mining claims: [36]

- "The Soda No. 1 Placer Mining Claim," at page 131 thereof;
- "The Soda No. 2 Placer Mining Claim," at page 131 thereof;
- "The Soda No. 3 Placer Mining Claim," at page 132 thereof;
- "The Soda No. 4 Placer Mining Claim," at page 132 thereof;
- "The Soda No. 5 Placer Mining Claim," at page 133 thereof;
- "The Soda No. 6 Placer Mining Claim," at page 133 thereof;
- "The Soda No. 7 Placer Mining Claim," at page 134 thereof;
- "The Soda No. 8 Placer Mining Claim," at page 134 thereof;
- "The Soda No. 9 Placer Mining Claim," at page 135 thereof;
- "The Soda No. 10 Placer Mining Claim," at page 135 thereof;
- "The Soda No. 11 Placer Mining Claim," at page 136 thereof;
- "The Soda No. 12 Placer Mining Claim," at page 136 thereof;
- "The Soda No. 13 Placer Mining Claim," at page 137 thereof;
- "The Soda No. 14 Placer Mining Claim," at page 137 thereof;
- "The Soda No. 15 Placer Mining Claim," at page 138 thereof;
- "The Soda No. 16 Placer Mining Claim," at page 138 thereof;
- "The Soda No. 17 Placer Mining Claim," at page 139 thereof;
- "The Soda No. 18 Placer Mining Claim," at page 139 thereof;
- "The Soda No. 19 Placer Mining Claim," at page 140 thereof;
- "The Soda No. 20 Placer Mining Claim," at page 140 thereof;
- "The Soda No. 21 Placer Mining Claim," at page 141 thereof;
- "The Soda No. 22 Placer Mining Claim," at page 141 thereof;
- "The Soda No. 23 Placer Mining Claim," at page 142 thereof;
- "The Soda No. 24 Placer Mining Claim," at page 142 thereof;

"The Soda No. 25 Placer Mining Claim," at page 143 thereof;
"The Soda No. 26 Placer Mining Claim," at page 143 thereof;
"The Soda No. 27 Placer Mining Claim," at page 144 thereof;
"The Soda No. 28 Placer Mining Claim," at page 144 thereof;
"The Soda No. 29 Placer Mining Claim," at page 145 thereof;
"The Soda No. 30 Placer Mining Claim," at page 145 thereof;
"The Soda No. 31 Placer Mining Claim," at page 146 thereof;

[37]

"The Soda No. 48 Placer Mining Claim," at page 154 thereof;
"The Soda No. 49 Placer Mining Claim," at page 155 thereof;
"The Soda No. 50 Placer Mining Claim," at page 155 thereof;
"The Soda No. 67 Placer Mining Claim," at page 164 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 73 Placer Mining Claim," at page 167 thereof;
"The Soda No. 86 Placer Mining Claim," at page 173 thereof;
"The Soda No. 92 Placer Mining Claim," at page 176 thereof;
"The Soda No. 93 Placer Mining Claim," at page 177 thereof;
"The Soda No. 113 Placer Mining Claim," at page 187 thereof;
"The Soda No. 114 Placer Mining Claim," at page 187 thereof;
"The Soda No. 130 Placer Mining Claim," at page 195 thereof;
"The Soda No. 218 Placer Mining Claim," at page 218 thereof;

Dated this 24th day of November, 1914.

BENJAMIN F. BLEDSOE,

Judge. [38]

[Endorsed]: No. B. 55-Eq. U. S. District Court, Southern District California, Southern Division. In Equity. E. Thompson, vs. Thomas W. Pack, Stella Schuler, Joseph K. Hutchinson. Restraining Order and Order to Show Cause. Filed Nov. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Building, San Francisco, Attorneys for Complainant. Eq. O. Bk. [39]

[Order Continuing Hearing to December 8, 1914.]

At a stated term, to wit, the July Term, A. D., 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the seventh day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants..

This cause coming on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; it is ordered that this cause be, and the same hereby is continued until Tuesday, the 8th day of December, 1914, at 10:30 o'clock, A. M., for said hearing. [40]

**[Order of Submission of Application for Preliminary
Injunction, etc.]**

At a stated term, to wit, the July Term, A. D., 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the eighth day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause having come on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; and said application for a preliminary injunction having been argued, in connection with the argument of the application for a preliminary injunction in cause No. B. 46—Equity, E. Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants, by Charles W. Slack, Esq., of counsel

for defendants, and by A. V. Andrews, Esq., of counsel for complainant; it was ordered that this cause be, and the same thereby was submitted to the court for its consideration and decision on complainant's application for a preliminary injunction and the argument thereof. [41]

**[Order Granting Application for Temporary
Injunction, etc.]**

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday the eleventh day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause having heretofore been submitted to the Court for its consideration and decision under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; and the Court

having duly considered the same and being fully advised in the premises, now, in accordance with the conclusions of the Court expressed in its opinion this day filed in cause No. B. 46—Equity, E. Thompson, Complainant, vs. Thomas W. Pack et al., defendants, it is ordered that complainant's application for said temporary injunction be, and the same hereby is granted, counsel for complainant to prepare and present a suitable order in accordance herewith. [42]

[Opinion.]

*In the District Court of the United States, in and for
the Southern District of California.*

C. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

This matter is before the Court on an order to show cause why a temporary injunction *pendente lite* should not issue restraining the defendants from putting of record certain Notices of Forfeiture with Affidavits of services thereof; such notices being those provided in Section 2324 Revised Statutes of the United States, and Section 14260 of the Civil Code of the State of California, with reference to forfeiting of part interests of mining claims.

The bill in equity as filed contains much matter that seems to be immaterial, much that is purely "epithetic," to use an expressive phrase, and a great

deal averred upon information and belief, and not positively. With respect to this letter the Court feels that it should not, of course, consider it upon this order to show cause, because of the fact that under the law the complainant, to be entitled to positive relief at this juncture, and in advance of a hearing, must base his request for such relief upon positive allegations. Laying out of consideration, however, the matters referred to above, it may be said, that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing. Briefly summarized, they are: That the Plaintiff in the year nineteen hundred and ten, in conjunction with the Defendant Pack, and certain other individuals mentioned, located and recorded [43] one hundred and seventy-five certain Placer mining claims, situate in the County of San Bernardino, State of California; That plaintiff is now, and ever since the day of said location, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; That during the month of September, in the year nineteen hundred and fourteen, the defendant herein, caused to be served upon plaintiff a certain notice of forfeiture, set out in the bill of complaint, and by which it was sought, pursuant to the sections of the Revised Statutes and Civil Code above referred to, to forfeit the title of plaintiff in and to each and all of the one hundred seventy-five (175) described placer mining claims heretofore referred to; That said notice contained the appropriate statements that unless plaintiff, within

ninety days after the service of the same upon him, paid to the Defendants or to the defendant Joseph K. Hutchinson for said defendants, the sum of seven hundred dollars (\$700), claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack, upon said claims, in the years nineteen hundred and eleven (1911) and nineteen hundred twelve (1912), that the interest of plaintiff would become forfeited to the said Joseph K. Hutchinson; plaintiff then alleges that the said Pack did not expend, or cause to be expended, of his own money, during the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912) or at any other time the sum of fifty-six hundred dollars (\$5600.), of which the said seven hundred dollars (\$700.) was the one-eighth part upon or for, the benefit of said placer mining claims, or at all; That at least twenty-eight hundred and thirty-six (\$2836.) was contributed by plaintiff and his co-locators to the defendant Pack, for the purpose of doing the assessment work upon the claims mentioned, for the years nineteen [44] hundred and eleven (1911) and nineteen hundred and twelve (1912): Plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims, was obtained and is held for the sole use and benefit of the Foreign Mines and Development Company, and the American Trona Company and the California Trona Company: It is also alleged that in the year nineteen hundred and twelve (1912) while plaintiff and his co-locators were engaged in the performance of the annual assessment work upon said

claims they were forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company.

If these facts thus alleged be true, and at this time the Court must assume them to be true, because no *affadavit* or answer in opposition to or in explanation of them, has been presented by the defendants, then it would appear that the defendants have no right to claim or exact a forfeiture, as against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of defendants, leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, in so far as they seem to have effected a divestiture of plaintiff's undivided interest in and to the mining property in question. On such a state of facts I apprehend the Court, after an accounting or other appropriate investigation, would make a decree determinative of the rights of the parties and the protection thereof. This decree, under the case as made by the facts to be taken as true would in its substantial aspects, be in favor of the plaintiffs. The only question for **determination** then, is whether or not the plaintiff should be protected in his rights, pending such final determination by the Court, and whether or not the strong arm of the Court should be employed at this time to enjoin the [45] defendants from placing of record, that which plaintiff claims would constitute a cloud upon his title to wit: The notice of forfeiture with

the affidavit of service thereof. That it would constitute such a cloud, I think, is indisputably clear. It was held in *Pixley v. Huggins*, 15 Cal. 128, that the true test as to whether or not a certain instrument would cast a cloud upon the title, upon the plaintiff's property, was this: "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed to be required to offer evidence to defend a recovery? If such proof would be necessary the cloud would exist: if the proof would be unnecessary no shade would be cast by the presence of the deed." This decision has been cited frequently and I apprehend states the law concisely. In this case it is apparent that the filing of the notice and *affidavit* of service, would *prima facie* serve to divest plaintiff of his interest in the properties and that it would require extrinsic evidence on his part to defeat a suit of ejectment, based upon the forfeiture apparently evidenced by the notice of labor done and failure to contribute thereto. For these reasons I am constrained to hold that plaintiff has presented a *prima facie* case, free from colorable doubt, is entitled to a temporary injunction *pendente lite*.

Plaintiff's counsel will draft an appropriate order.

BENJAMIN F. BLEDSOE,

Judge.

[Endorsed]: No. B. 46—Equity. United States District Court, Southern District of California, Southern Division. *C. Thompson vs. Thomas W. Pack, et al.* Opinion re Injunction *Pendente Lite*.

Filed December 11, 1914, Wm. M. Van Dyke, Clerk,
By C. E. Scott, Deputy Clerk. [46]

[Order for Injunction Pendente Lite.]

*District Court of the United States, Southern Dis-
trict of California.*

B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

On the return of the order to show cause made by me in the above entitled action on the 24th day of November, 1914, and returnable on the 7th day of December, 1914, and this cause coming on regularly for hearing on the return day thereof, upon the verified bill of complaint. After hearing Messrs. Clayberg & Whitmore for the complainants and Messrs. Charles W. Slack and Joseph K. Hutchinson for the defendants, and no sufficient cause to the contrary being shown:

IT IS ORDERED that the said order to show cause be, and the same hereby is made absolute until the final determination of this suit. It is further Ordered, that you, the said defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees, are hereby specifically re-

strained and enjoined from in any way or manner taking any steps towards forfeiting or declaring a forfeiture of plaintiff's right, title and interest in, and to those certain placer mining claims named and described in the Bill of Complaint filed herein and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date of the commencement of this suit served upon plaintiff herein, until the final hearing and termination of this suit or until the further order of this court.

The Clerk will issue the Writs accordingly.

Dated this 11th day of December, 1914.

BENJAMIN F. BLEDSOE,
Judge of said District Court. [47]

[Endorsed]: "No. B. 55—Equity. In the District Court of the United States in and for the Southern District of California, Southern Division. *E. Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants. Order for Injunction Pendente Lite.* Filed Dec. 15, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Clayberg & Whitmore Attorneys for Dfts. Eq. Order Book." [48]

In the District Court of the United States, Southern District of California.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

**Notice of Motion for Order Vacating Order for
Injunction Pendente Lite and Dissolving In-
junction Pendente Lite.**

To E. Thompson, Complainant above named, and to
Messrs. H. L. Clayberg and Clayberg & Whit-
more, his attorneys.

You and each of you will please take notice, that
on Saturday the 19th day of December, 1914, at the
hour of 10:30 o'clock A. M. or as soon thereafter as
counsel can be heard at the courtroom of the above-
entitled court, Southern Division thereof, in the Fed-
eral Building, in the city of Los Angeles, County of
Los Angeles, State of California, defendants above
named will move said court for an order vacating the
order granting an injunction *pendente lite* in the
above-entitled cause, heretofore and on the 11th day
of December, 1914, given, made and entered in the
above-entitled cause, and for a further order dissolv-
ing the injunction *pendente lite* issued pursuant
thereto.

Said motion will be made upon the following
grounds:

1. That the allegations of the complainant's bill
on file in the above-entitled cause, taken in connec-
tion with the allegations contained in the affidavits
hereinafter mentioned and served herewith show
that complainant is not entitled to the order grant-
ing said injunction *pendente lite*.

2. That the above-entitled cause does not present
a case for the [49] making of said order for an

injunction *pendente lite*.

3. That defendants and each of them, will be irreparably injured if said order is not vacated and said injunction dissolved.

4. That said order does not provide for any security for defendants' costs and damages and it appears from the affidavits served herewith that complainant is financially irresponsible.

Said motion will be made upon the affidavits of Joseph K. Hutchinson, Stella Schuler and Thomas W. Pack, the defendants above named, served and filed herewith, and upon all the records, papers, proceedings and files in the above-entitled action, and upon this Notice of Motion and upon oral testimony to be adduced at the hearing of said motion.

Dated, Los Angeles, Cal., December, 14th, 1914.

JOSEPH K. HUTCHINSON,
Attorney for Defendants.

[Indorsed]: Original. No. B. 55—Equity. United States District Court Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thos. W. Pack et al., Defendants. Filed Dec. 14, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Notice of Motion to Vacate Order for Injunction *Pendente Lite*. Pursuant to Rule 40, E. L. Ball, Attorney at law, 737 Consolidated Realty Bldg., Los Angeles, Cal., is hereby designated as the person on whom to serve papers in this cause. Joseph K. Hutchinson, Attorney for Defendants, San Francisco, Cal. [50]

*In the District Court of the United States, Southern
District of California.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and
JOSEPH K. HUTCHINSON,

Defendants.

**Affidavit of Joseph K. Hutchinson [on Motion for
Order Vacating Order for Injunction Pendente
Lite, etc.].**

State of California,

County of Los Angeles,—ss.

JOSEPH K. HUTCHINSON, being first duly sworn, deposes and says:

That he is, and at all the times herein mentioned, was a white male citizen of the United States, and a resident and citizen of the State of California, over the age of twenty-one years, and one of the defendants in the above-entitled cause; that the interests of affiant in the subject matter of said cause are joint with and inseparable from the like interests of the other two defendants in said cause; that affiant makes this affidavit for and on behalf of each and all of the said defendants above-named, including affiant;

That affiant has read the Bill of Complaint on file in said cause, and knows the contents thereof, and each and every allegation therein contained;

That heretofore, and on or about, to wit: the 14th day of January, 1914, S. Schuler, one of the defendants above named, made, executed, acknowledged and delivered to affiant her certain grant, bargain and sale deed conveying to affiant all the right, title and interest, to wit, an undivided one-eighth interest, of the said defendant [51] Schuler in and to the 175 placer mining claims referred to in Section I of the said Bill of Complaint on file herein, said 175 placer mining claims being situate in and upon Searles Borax Lake in the county of San Bernardino, State of California; that thereafter and in said month of January, 1914, said deed was duly recorded in the office of the County Recorder of said County of San Bernardino; that at the time the said defendant Schuler conveyed her said interest in said placer mining claims to affiant the said interest so conveyed stood upon the records of the County Recorder in and for the said county of San Bernardino in the name of the said defendant Schuler and had so stood in her name for more than one year prior to the date of said transfer; that affiant knew at the time of the said conveyance by the said Schuler to him, and had known for a long time thereto, that the said interest of the said Schuler so stood upon the records of the County Recorder of the county of San Bernardino, in the name of the said Schuler, without any cloud upon or encumbrance against said interest appearing upon the face of the said records; that affiant relied upon his said knowledge of said records in purchasing said interest from said Schuler, and, pursuant thereto, in taking said deed and conveyance;

that at the time of the said conveyance by the said Schuler to affiant, affiant had no knowledge, notice or belief of whatsoever kind or nature of the existence of any claims, rights or equities of whatsoever kind or nature against or related to in any way whatsoever the said interest of the said Schuler, and owned held or claimed by persons other than the said Schuler; that at the time of the said conveyance by the said Schuler to affiant, affiant did not know nor did he have any knowledge, notice or belief of whatsoever kind or nature, of the existence of the deed and conveyance referred to in Section V of the Bill of Complaint on file herein from the said Schuler as grantor to one J. A. Shellito as grantee, whereby the said Schuler transferred and conveyed to the said Shellito all of her right, title and interest in and to said notice or belief of whatsoever [52] kind or nature as to the fact, referred to in Section V of the said Bill of Complaint, that the said Schuler had on the 25th day of December, 1913, or at any other time, made, executed, acknowledged and delivered her deed and conveyance to the said Shellito, or had made, executed, acknowledged and delivered any other deed, or made any other transfer to any other person whomsoever; that affiant took said conveyance from said Schuler as an innocent purchaser and wholly without notice of already existing rights, claims or equities against the interest so conveyed by Schuler to affiant, belonging to said Shellito or anyone whomsoever; affiant denies that, at the time of receiving said conveyance, or at any other time, or at all, he was fully, or at all, informed and had full,

or any other, knowledge, or was fully, or at all, informed, or had full, or any other, knowledge, that the said Schuler had conveyed all, or any portion of, her rights, interests, claims and property, or all, or any of, her rights, or interests, or claims, or property, in said conveyance described, to the said J. A. Shellito, or any other person whomsoever, a long time prior to the execution of said conveyance by said Schuler to affiant, or at any other time, or at all;

That for and in consideration of the said conveyance by said Schuler to affiant, and at the time of said conveyance, and as a part thereof, affiant paid to said Schuler, and said Schuler received and accepted from affiant a certain sum of money in cash; that affiant made and completed said purchase from said Schuler of her said interest, in good faith, and without intention to, by the said purchase, defraud or injure anyone whomsoever;

Affiant denies that he took said conveyance from said Schuler in pursuance of a combination and conspiracy, or a combination, or conspiracy, by and between, or by, or between, the defendants in the above-entitled cause, or any of them, and the Foreign Mines & Development Company, the American Trona Company, and the California [53] Trona Company, or the Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, wherein and whereby, or wherein, or whereby, the defendants above named, or any of them, and the said corporations, or any of the said corporations, confederated and com-

bined, or confederated, or combined, together to injure plaintiff above named and to deprive and defraud him, or deprive, or defraud him, or to injure plaintiff above named, or defraud him of all, or any portion of, his right, title and interest, or all, or any portion of, his right, or title, or interest in and to, or in, or to, said placer mining claims;

Affiant denies that the said conveyance by the said Schuler to affiant was made and done, or was made, or done, pursuant to and in order to carry out a combination and conspiracy, or a combination, or conspiracy, or pursuant to, or in order to carry out a combination and conspiracy, or a combination, or conspiracy, to injure plaintiff and to deprive and defraud him, or deprive, or defraud him, or to injure plaintiff, or to deprive, or defraud him, of all, or any portion of, his right, title and interest, or all, or any portion of, his right, or title, or interest, in and to, or in, or to, said placer mining claims, and each and all of them, or said placer mining claims, or each, or all of them; affiant denies that said conveyance by said Schuler to affiant was made and done, or was made, or done, wholly and totally, or wholly, or totally, without a valuable or other consideration;

Affiant denies that the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company have, or that the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, has, fraudulently, or in any other manner, attempted to procure the right, title and interest of Pack, one of the defendants above named, or the

right, or title, or interest of the said Pack, in and to said placer locations, or in, or to, said placer locations for the said, [54] or any other purpose, of using the said interest of the said Pack in and to said locations, or in, or to, said locations, in such a way and manner, or in such a way, or manner as to destroy all, or any portion of, plaintiff's rights and interest, or plaintiff's rights, or interest, or any part thereof, or of both or either thereof, therein, and to defraud plaintiff above named, out of all, or any portion of, interest in and to, or in, or to, said claims, and each of them, or any of them, or to said claims, or each of them, or any of them, or in such a way, or manner, as to destroy, all, or any portion of, plaintiff's rights and interest, or rights, or interest, or any part or portion thereof, or of either or both thereof, therein, or to defraud plaintiff above named out of all, or any portion of, interest in and to, or in, or to, said claims, or any of them; affiant denies that he has been acting as the agent, representative and attorney, or as agent, or as the representative, or attorney, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or of the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, in endeavoring to deprive and defraud, or to deprive, or defraud, plaintiff of his rights and title, or rights, or title, or any part or portion thereof, or either or both thereof, in and to, or in, or to, said placer mining locations; affiant denies that, under the direction and orders, or under the direction, or orders, of the

said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, fraudulently, or in any other manner, he obtained said transfer of the said one-eighth interest in and to, or in, or to, said placer mining claims, from said Schuler, in pursuance to a combination and conspiracy, or in pursuance to a combination, or conspiracy entered into [55] and carried on, or entered into, or carried on, by and between, or by, or between, said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and the said defendants herein, or any of them, or by and between, or by, or between, said Foreign Mines & Development Company, American Trona Company, and the California Trona Company, or said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the said defendants herein, or any of them, to injure plaintiff and defraud and deprive him, or to injure plaintiff, or defraud him of all, or any portion, of his right, title and interest, or all, or any portion of, his right, or title, or interest, in and to, or in, or to, said claims, and each of them, or in and to, or in, or to, said claims, or each of them, or that he obtained the said transfer of the said one-eighth interest in and to, or in or to, said placer mining claims, in pursu-

ance of any combination and conspiracy, whatsoever, or in pursuance of any conspiracy whatsoever;

Affiant denies that in further pursuance of said, or any other combination and conspiracy, or said, or any other, combination, or conspiracy, and under the orders and direction, or under the orders, or direction, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or that in further pursuance of said, or any other, combination and conspiracy, or said, or any other, combination, or conspiracy, or under the orders and directions, or under the orders, or directions, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the [56] California Trona Company, or any of them, affiant and his co-defendants, or any of them, caused to be served upon plaintiff notice of forfeiture referred to in the Bill of Complaint on file herein; affiant denies that the said transfer of the said one-eighth interest in and to, or in, or to, said claims by the said Schuler to affiant, and the serving of said notice of forfeiture upon the same, or the said transfer of the said one-eighth interest in and to, or in, or to, said claims, by the said Schuler to affiant, or the serving of the said notice of forfeiture upon the plaintiff, was all done, or that any part thereof was done, in pursuance to and in

the carrying out of, or in pursuance to, or in the carrying out of, a combination and conspiracy, or a conspiracy, entered into by and between, or by, or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between, the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and the defendants above named, or any of them, or by and between, or by, or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between, the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the defendants above named, or any of them; affiant denies that the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, and the defendants above named, or the defendants above named, or any of them, confederated together, for the purpose of injuring the plaintiff and depriving and defrauding him of, or for the purpose of injuring plaintiff, or defrauding him of, all, or any portion of his rights, title and interest, or all, or any portion of, his right, or title, or interest, in and [57] to, or in, or to, said placer mining claims;

Affiant denies that the notice of forfeiture was

prepared and served upon plaintiff, or was prepared, or served, upon plaintiff, pursuant to and in the furtherance of, or pursuant to, or in the furtherance of, such, or any, other combination and conspiracy, or of such, or any other, conspiracy, between the defendants above named, or any of them, and the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or between the defendants above named, or any of them, and the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or all or any of them; affiant denies that neither said Pack, defendant above named, nor any of the defendants above named, or their alleged co-conspirators, are entitled to any contribution from plaintiff in any sum or amount whatsoever;

And further answering Section XIX of said Bill of Complaint, affiant alleges the plaintiff has a plain, speedy and adequate remedy at law in the premises by way of payment of complainant's portions of the sums so expended for the performance of assessment work for the year 1911, and the demanding, procurement and recordation of a receipt for such payment as provided by Section 14260 of the Civil Code of the State of California and the recordation of such a receipt as effectually removes any cloud arising from the recordation of the affidavit of service of Exhibit "A" as any decree of this court or any other

court can or will; and that affiant is irreparably injured in the event that complainant neglects or refuses to pay his said proportion of said sums in that affiant loses entirely the benefit and effect of his said Notice of Forfeiture through failure to record an affidavit of the service of [58] the same within ninety (90) days after said service, as required by said section 14260 of the Civil Code of the State of California, affiant being restrained from recording said affidavit of service by order of the above-entitled Court.

JOSEPH K. HUTCHINSON.

Subscribed and sworn to before me this 14 day of December, 1914.

[Seal]

SYDNEY VAIL PARDEE,
Notary Public in and for the County of Los Angeles,
State of California. [59]

*In the District Court of the United States, Southern
District of California.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and
JOSEPH K. HUTCHINSON,

Defendants.

**Affidavit of Defendant Thomas W. Pack on Motion
to Dissolve Injunction Pendente Lite etc.**

State of California,

County of Los Angeles,—ss.

THOMAS W. PACK, being duly sworn deposes

and says: That he is and at all the times herein mentioned was, a white male citizen of the United States and a resident and citizen of the State of California, over the age of twenty-one years, and one of the defendants in the above-entitled cause; that the interests of affiant in the subject matter of said cause are joint with and inseparable from the like interests of the other two defendants in said cause;

That affiant has read the Bill of Complaint on file in said cause and knows the contents thereof and each and every allegation therein contained; that all of the facts set forth and attempted to be set forth in said Bill of Complaint are within the personal knowledge of affiant; that affiant makes this affidavit on motion to dissolve the Injunction *pendente lite* heretofore given, made and entered by the above-entitled Court in said cause, for and on behalf of each and all of the said defendants including affiant;

That in the year 1910 affiant personally paid out and expended of his own moneys all of the expenses and costs and every expense [60] and cost of locating and recording in the names of R. Waymire, H. C. Fursman, W. Huff, H. A. Baker, E. Thompson, P. Perkins and D. Smith and affiant, as set forth in Section I of the Bill of Complaint on file herein, the placer mining claims described in said bill, reference to which is hereby made for a more complete description thereof; that said R. Waymire, H. C. Fursman, W. Huff, H. A. Baker, P. Perkins, E. Thompson and D. Smith did not contribute or pay to affiant, nor have they ever contributed or paid to affiant, nor did any of them contribute nor pay to affiant, nor have any of

them ever contributed, or paid to affiant, said money so paid out and expended by affiant for said expenses and costs, or any part or portion thereof;

Affiant alleges and affirms that he did pay out and expend of his own moneys during the year 1912 the sum of \$4,400 in connection with and for the purpose of procuring the performance of the annual labor upon the said forty-four placer mining claims hereinbefore referred to and more fully described in the Bill of Complaint on file herein, which said sum affiant believes should be properly charged against and constitute a part of the value of, the annual assessment work for the year 1912 and which said sum affiant believes should be repaid and contributed to him by his said co-locators and that complainant herein should reimburse affiant for one-eighth of said sum; that the co-owners of affiant in the said hereinabove referred to placer mining claims, including complainant, have not contributed or paid to affiant, nor has any of them, contributed or paid to affiant at any time, or at all, any part or portion whatsoever of said sum of \$4,400 paid out and expended by affiant as hereinabove alleged, nor have they, nor has any of them, ever tendered or offered any part or portion whatsoever of said sum of \$4,400 to affiant except as in the Bill of Complaint set forth; affiant denies that complainant or any of his co-locators expended any money for or performed any representation work in or [61] for the year 1912 on said forty-four placer mining claims or either thereof heretofore referred to, or that any representation work was done on said forty-four claims or either or any of them, other

than the work done by affiant as hereinabove set out;

Affiant denies that he has ever conspired and combined, or conspired or combined, with the other defendants in this suit and with the Foreign Mines & Development Company, the American Trona Company and the California Trona Company or with any or either of them to injure complainant, to deprive and defraud or to deprive or to defraud complainant of all or any of complainant's right, title and interest, or right, or title, or interest, in and to, or in, or to, the placer mining claims described in said Bill of Complaint; affiant denies that he caused the Notice of Forfeiture, Exhibit A, to be served upon complainant in pursuance of a, or any, combination and conspiracy, or of a, or any, combination or conspiracy, and under the orders and directions, or under the orders, or under the directions, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or any or either of them;

Affiant denies that the sum of \$750 or any part of said sum sued for in the action of "W. W. Colquhoun, Plaintiff, vs Thos. W. Pack, Henry E. Lee and T. O. Toland, a co-partnership, Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, Defendants," and numbered 46604 in the records of the Superior Court of the State of California, in and for the City and County of San Francisco, referred to in Section IX of the Bill of Complaint on file herein, constitutes part of the amount which affiant and his co-defendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Com-

plaint, to have been paid by affiant in the year 1912 for doing the assessment work on the said 12 placer mining claims; affiant alleges that neither said sum of \$750 nor any part of said sum constitutes a part or portion of the [62] said sum of \$4400 referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of \$3645, or any part of said sum, sued for in the action of "M. A. Varney, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, and Thos. W. Pack, Henry E. Lee and T. O. Toland, a co-partnership, Defendants," and numbered 46692, in the records of the Superior Court of the State of California, in and for the City and County of San Francisco, referred to in Section X of the Bill of Complaint on file herein, constitutes part of the amount which affiant and his co-defendants in the above entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been paid for by affiant in the year 1912 for doing the assessment work on the said 12 placer mining claims; affiant alleges that neither said sum of \$3645, nor any part thereof, constitutes a part or portion of the said sum of \$4400 referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of \$750, or any part of said sum, sued for in the action of "W. W. Colquhoun, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D.

Smith and S. Schuler, a co-partnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals, Defendants," and numbered 50723 in the files and records of the Superior Court of the State of California, in and for the City and County of San Francisco, referred to in Section XI of the Bill of Complaint on file herein, constitutes part of the amount which affiant and his co-defendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been paid by affiant in the year 1912 for doing the assessment work on the said 12 placer [63] mining claims; affiant alleges that neither said sum of \$750, or any part of said sum constitutes a part or portion of the said sum of \$4400 referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies the sum of \$3670, or any part of said sum, sued for in the action of "M. A. Varney, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, and S. Schuler, a co-partnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as individuals, Defendants," and numbered 50724 in the files and records of the Superior Court of the State of California in and for the City and County of San Francisco, referred to in Section XII of the Bill of Complaint on file herein, constitutes part of the amount which affiant and his co-defendants in the above-entitled cause claim in the Notice of Forfeiture re-

ferred to in the said Bill of Complaint, to have been paid by affiant in the year 1912 for doing the assessment work on the said 12 placer mining claims; affiant alleges that neither said sum of \$3670, or any part thereof, constitutes a part or portion of the said sum of \$4400 referred to in said Notice of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

Affiant denies that the sum of \$1443.50, or any part of said sum, sued for in the action of "Raphael Mojica, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, a co-partnership, H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, an association, and Henry E. Lee, Thomas O. Toland, H. C. Fursman, W. Huff, Rudolph Waymire, P. Perkins, H. A. Baker, E. Thompson, Dudley Smith, Stella Schuler, John Doe, Jane Roe, Richard Roe and Mary Roe, Defendants," and numbered 54989 in the files and records of the Superior Court of the State of California in and for the City and County of San Francisco, referred to in [64] Section XII of the Bill of Complaint on file herein, constitutes part of the amount which affiant and his co-defendants in the above-entitled cause claim in the Notice of Forfeiture referred to in the said Bill of Complaint, to have been paid by affiant in the year 1912 for doing the assessment work, on the said 44 placer mining claims; affiant alleges that neither the sum of \$1443.50, nor any part of said sum, constitutes a part or portion of the said sum of \$4400 referred to in said Notice

of Forfeiture, and hereinabove alleged by affiant to have been paid out and expended by him;

That answering the allegations of Section XV of said Bill of Complaint this Affiant denies that during the year 1911 and prior to the time any money is claimed to have been expended by affiant in the Notice of Forfeiture hereinabove referred to, or at any other time, or at all, affiant was indebted to said Henry E. Lee, the duly authorized agent of plaintiff, and his co-locators, or the duly authorized agent of plaintiff, or his co-locators, or to the said Lee in any other capacity, or as an individual, or personally, or at all, in the sum of \$1836, or in any other sum, or at all, and denies that the said Lee, acting as such agent for plaintiff and his co-locators, or that the said Lee in any other capacity, or as an individual, or personally, or at all, directed affiant to use and utilize, or to use, or utilize, all of the sum of \$1836, or any portion thereof or so much thereof as might be necessary, in the annual representation of the placer mining claims referred in said Bill of Complaint for the years 1911 and 1912 or for the year 1911 or for the year 1912, or for any other year, or at all, and denies that affiant agreed with the said Lee that he would so utilize and use, or that he would so utilize or use said money; affiant denies that the sum of \$836 is and should be, or is or should be a portion of the money expended by affiant as described in the said Notice of Forfeiture; affiant denies that the said money and indebtedness or money or indebtedness was money due and [65] owing, or was money due, or owing, to this plaintiff and his

co-locators, or to this plaintiff, or his co-locators, from affiant; affiant denies that said money should be credited to this plaintiff and his co-locators, or to this plaintiff, or his co-locators, in proportion of their respective interests in the said 44 placer mining claims; affiant denies that he has at any time whatsoever owed to the said Lee and to plaintiff and his co-locators, or to the said Lee, or to plaintiff, or to his co-locators, any sum or sums of money whatsoever; affiant alleges that the said Lee is now, and for a long time prior to the date hereof, has been indebted to affiant in a sum in excess of \$2000; that said sum is now wholly due and owing from the said Lee to affiant and unpaid.

And further answering the allegations contained in said Section XV affiant alleges that the facts and circumstances relating to the signing and delivery of the written acknowledgment of indebtedness to said Henry E. Lee in the sum of \$1836 referred to in said section are as follows: that at or just prior to the time of the signing and delivery of said written acknowledgment and several months prior to December, 1911, and Henry E. Lee applied to this affiant for a loan of money, that said Lee was then indebted to affiant in a large sum and that said Lee stated that if affiant would assist said Lee to obtain a loan said Lee would repay affiant the amount said Lee then stood indebted to affiant, that said Lee then requested affiant to endorse the promissory note of said Lee in order that said Lee might negotiate the same and procure a loan, that affiant refused to endorse the note of said Lee, whereupon said Lee requested that

affiant give said Lee a written acknowledgment of indebtedness from affiant to said Lee in order that said Lee might obtain a loan on his, said Lee's promissory note secured by assignment of said written acknowledgment of indebtedness, that said Lee requested that said written acknowledgment of indebtedness be given in some odd some in order [66] that a possible lender might not suspect that the same had been given as an accommodation, that affiant acceded to the said requests of said Lee and gave said Lee a written acknowledgment of indebtedness in the form of an "I. O. U." for the sum of \$1836, for the purpose of enabling said Lee to repay affiant the amount of said Lee's indebtedness to affiant, that affiant received no consideration for said written acknowledgment, either past or present, that said Lee was unable to procure a loan on the security of said I. O. U., that the same has never been negotiated and is wholly without consideration of any kind whatsoever or at all;

That affiant alleges that the sum of \$100, alleged in said Bill of Complaint to have been paid by one Henry E. Lee as the agent and representative of complainant and his co-locators to affiant for complainant and his co-locators, was actually paid to affiant on or about the 18th day of January, 1912, that at the time said sum was so paid to affiant, said Lee was indebted to affiant in a large sum, to wit, a sum in excess of \$1000, that affiant elected to and did treat said payment of said \$1000 as a payment on account of said indebtedness of said Lee to af-

fiant, that affiant does not elect to so treat said payment of said \$1000 as a payment on account of the indebtedness of said Lee to affiant; that said sum of \$1000 was not advanced for or on behalf of the complainant and his co-locators herein or any or either of them, but, so far as this affiant knows and to the best of his knowledge and belief, solely on behalf of said Lee himself;

Affiant alleges on his information and belief that complainant is financially irresponsible and unable to pay his or any proportion of the money expended in doing the assessment work on said claims during the year 1912;

Affiant further alleges that complainant has an adequate remedy at law by way of payment of the complainant's proportion of the sum so expended for the performance of assessment work for [67] the year 1912, and the demanding, procurement and recordation of a receipt for said payment as provided in section 14260 of the Civil Code of the State of California, that the recordation of such receipt as effectually removes any cloud arising from the recordation of the affidavit of service of Exhibit "A" as any decree of this Court or any other Court can or will; and that affiant is irreparably injured in the event that complainant neglects or refuses to pay his said proportion of said sums in that affiant loses entirely the benefit and effect of his said Notice of Forfeiture through failure to record an affidavit of the service of the same within ninety (90) days after said service, as required by said Section 14260 of the Civil Code of the State of California, affiant being re-

strained from recording said affidavit of service by order of the above-entitled Court.

THOMAS W. PACK,

Subscribed and sworn to before me this 14th day of December, 1914.

[Seal.] **SYDNEY VAIL PARDEE,**

Notary Public in and for the County of Los Angeles, State of California. [68]

In the District Court of the United States, Southern District of California.

E. THOMPSON,

Complainant,

vs.

**THOMAS W. PACK, STELLA SCHULER, and
JOSEPH K. HUTCHINSON,**

Defendants.

Affidavit of S. Schuler [on Motion to Dissolve Injunction Pendente Lite etc.].

State of California,
County of Los Angeles,—ss.

S. SCHULER, being duly sworn, deposes and says: That she is, and at all the times herein mentioned, was a white, female citizen of the United States, and a resident and citizen of the State of California, over the age of 21 years, and one of the defendants in the above-entitled cause; that the interests of affiant in the subject matter of said cause are joint with and inseparable from the like interests of the other two defendants in said cause; that

affiant makes this affidavit for and on behalf of each and all of the said defendants above named, including affiant;

That affiant has read the Bill of Complaint on file in said cause and knows the contents thereof and each and every allegation therein contained;

Affiant denies that, on or about the 25th day of December, 1913, she made, executed, acknowledged and delivered her deed of conveyance to one J. A. Shellito whereby she transferred and conveyed, or whereby she transferred, or conveyed, to said Shellito, or to anyone else whomsoever, all or any portion, of her rights, title and interest, or all, or a portion of, her rights, or title, or interest, in and to, or in, or to, said placer mining claims, or [69] that she delivered any deed and conveyance, or deed, or conveyance, to said Shellito, or to anyone else whomsoever;

Affiant alleges that on or about, to wit, the 25th day of December, 1913, affiant made, signed and acknowledged a deed of conveyance from herself as grantor to one J. A. Shellito as grantee; that said deed conveyed and would have conveyed, had the same been delivered, all of affiant's right, title and interest in and to said placer mining claims; that said deed was so executed by affiant to be placed in escrow, and not to be delivered to the grantee named therein, until certain conditions to be performed by the said grantee named therein, for and on behalf of affiant, had been fully performed; that many of such conditions were impossible of fulfillment and performance within a period of many months after the

date of said deed; that other of the said conditions were to be performed and fulfilled by the said Shellito in favor and on behalf of affiant immediately upon the signing and acknowledgment of said deed; that in and by the terms of said escrow, said deed was to be placed by affiant in the hands of the Security Trust & Savings Bank, a corporation, situate in the city of Los Angeles, county of Los Angeles, state of California, to be held by it as escrow holder, and to be delivered by it to said Shellito, upon the fulfillment and performance of all said conditions; that immediately upon the making, signing and acknowledgment of said deed, affiant at the city and county of San Francisco, state of California, handed the said deed to one Henry E. Lee, the person referred to in the Bill of Complaint on file herein, upon his promise made to affiant to take the same from the said city and county of Los Angeles, and there to place the said deed in escrow, with said Security Trust & Savings Bank;

That affiant is informed and believes, and therefore alleges the fact to be that the said Lee did not keep said promise so made to affiant, and that he did not place, nor has he ever [70] placed said deed in escrow with said Security Trust & Savings Bank, or elsewhere, pursuant to the terms of said promise made to affiant as aforesaid, or otherwise, or at all;

None of the conditions which were conditions precedent to the delivery by the said Security Trust & Savings Bank as escrow holder for affiant of said deed, has ever been fulfilled or performed by Shellito, or any other person, whomsoever; that said Lee has

never returned said deed to affiant; that affiant does not know where said deed now is, or has she known since the date upon which she handed the same to the said Lee, where the said deed, or in whose possession it, has been; that someone, of whose identity affiant has not personal knowledge, wholly without affiant's consent or knowledge or authority, recorded said deed, in the month of March or April, 1914, in the office of the county recorder of the county of San Bernardino, state of California;

That affiant is informed and believes, and therefore alleges, that the person who so recorded said deed in the said office of the county recorder of the county of San Bernardino, was the said Henry E. Lee;

That thereafter, and on or about, to wit: the 14th day of January, 1914, affiant made, executed, acknowledged and delivered to Joseph K. Hutchinson, one of the defendants, above named, her certain grant, bargain and sale deed, conveying to said Hutchinson all the right, title and interest, to wit: an undivided one-eighth interest, of affiant, in and to the 175 placer mining claims referred to in Section I of the said Bill of Complaint on file herein, which said 175 placer mining claims are situate in and upon Searles Borax Lake, in the County of San Bernardino, state of California; that at the time affiant conveyed her said interest in said placer mining claims to said Hutchinson, the said interests so conveyed stood upon the county records of the county recorder in and for the said county of San Bernardino in the name of affiant and had so stood in her name for more than one year prior to the date of [71] said

transfer without any cloud upon, or incumbrance against, said interest, appearing upon the face of the said records;

That prior to the said execution of the said deed to said Hutchinson, and after the said making, signing and acknowledging of said deed to said Shellito, affiant stated all of the facts of the case to her attorney, one Ezra W. Decoto, Deputy District Attorney of the county of Alameda, state of California, and thereupon and after said statement of all of the facts of the case by affiant to the said Decoto, the said Decoto advised affiant that she could legally, and without liability, or without breach of any duty owed by her to the said Shellito, or to anyone else, make, execute, and acknowledge the said deed to said Hutchinson; that thereafter and in the presence of the said Decoto, and acting upon his advice, the said Schuler made, executed, acknowledged and delivered the said deed to the said Hutchinson;

That at no time prior to the execution and delivery of said deed did affiant tell said Hutchinson, nor did her said attorney tell said Hutchinson, nor did either affiant or her said attorney in any way whatsoever notify the said Hutchinson that affiant had made, signed and acknowledged said deed to said Shellito, prior thereto, and on or about, to wit: the said 25th day of December, 1913, or at any other time, or at all;

That for and in consideration of the said conveyance by affiant to said Hutchinson, and at the time of said conveyance, and as a part thereof, said Hutchinson paid to affiant, and affiant received and ac-

cepted from said Hutchinson, a certain sum of money in cash; that said Schuler made and completed said sale to said Hutchinson of her said interest, in good faith, and without intention to, by the said sale, defraud or injure anyone whomsoever;

Affiant denies that she made said conveyance to said Hutchinson in pursuance of a combination and conspiracy, or conspiracy, by and between, or by, or between, the defendants in the above-entitled cause, or any of them, and the Foreign Mines [72] & Development Company, the American Trona Company, and the California Trona Company, or the Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, wherein and whereby, or wherein, or whereby, the defendants above named, or any of them, and the said corporations, or any of the said corporations, confederated and combined, or confederated, together, to injure plaintiff above named and to deprive and defraud him, or to injure plaintiff above named, or defraud him of all, or any portion of, his right, title and interest, or all, or any portion of his right, or title, or interest in and to, or in, or to, said placer mining claims;

Affiant denies that the said conveyance by affiant to the said Hutchinson was made and done, or was made, or done, pursuant to and in order to carry out a combination and conspiracy, or conspiracy, or pursuant to, or in order to carry out a combination and conspiracy, or conspiracy, to injure plaintiff and to deprive and defraud him, or defraud him, or to injure plaintiff, or defraud him, of all, or any portion

of, his right, title and interest, or all, or any portion of, his right, or title, or interest, in and to, or in, or to, said placer mining claims, and each and all of them, or said placer mining claims, or each, or all of them; affiant denies that said conveyance by affiant to the said Hutchinson was made and done, or was made, or done, wholly and totally, or wholly, or totally, without a valuable or other consideration;

Affiant denies that in pursuance of said, or any other, combination and conspiracy, or conspiracy, and under the orders and directions, or under the orders or directions of the Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and that in pursuance [73] of said, or any other, combination and conspiracy, or conspiracy, or under the orders and direction, or under the orders, or direction, of the said Foreign Mines & Development Company, the American Trona Company and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, affiant and her co-defendants, or any of them, caused to be served upon plaintiff Notice of Forfeiture referred to in the Bill of Complaint on file herein; affiant denies that the said transfer of the said one-eighth interest in and to, or in, or to, said claims by affiant to the said Hutchinson, and the serving of said Notice of Forfeiture upon the same, or the said transfer of the said

one-eighth interest in or to, or in, or to, said claims by affiant to the said Hutchinson, or the serving of the said Notice of Forfeiture upon the plaintiff, was all done, or that any part thereof was done, in pursuance to and in the carrying out of, or in pursuance to, or in the carrying out of, the combination and conspiracy, or a conspiracy, entered into by and between, or by or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between, the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, and the defendants above named, or any of them, or by and between, or by, or between, the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or by and between, or by, or between the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the defendants above named, or any of them; affiant denies that the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, [74] and the defendants above named, or the defendants above named, or any of them, confederated together, for the purpose of injuring the plaintiff and depriving and defrauding him of, or for the purpose of injuring plaintiff, or defrauding him of, all, or any portion of

his right, title and interest, or all, or any portion of his right, or title, or interest, in and to, or in, or to, said placer mining claims;

Affiant denies that the Notice of Forfeiture was prepared and served upon plaintiff, or was prepared, or served, upon plaintiff, pursuant to and in the furtherance of, or pursuant to, or in the furtherance of, such or any other, combination and conspiracy, or of such, or any other, conspiracy, between the defendants above named, or any of them, and the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company, or between the defendants, above named, or any of them, and the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or any of them, or the said Foreign Mines & Development Company, or the American Trona Company, or the California Trona Company, or all, or any of them; affiant denies that neither said Pack, defendant above named, nor any of the defendants above named, or the alleged co-conspirators, are entitled to any contribution from plaintiff in any sum or amount whatsoever;

And further answering Section XIX of said Bill of Complaint, affiant alleges that plaintiff has a plain, speedy and adequate remedy at law, in the premises, by way of payment of plaintiff's proportion of the sums so expended for the performance of assessment work for the year 1911, and the demanding, procurement and recordation of a receipt for such payment as provided by Section 14260 of

the Civil Code of the State of California; that the recordation of such a receipt as effectually removes any cloud arising from the recordation of the affidavit of service of [75] Exhibit "A," as any decree of this Court or any other Court can or will; that affiant is irreparably injured in the event that complainant neglects or refuses to pay his said portion of said sums, in that plaintiff is a non-resident of the State of California, as appears from the Bill of Complaint on file herein, and in that affiant loses entirely the benefit and effect of his said Notice of Forfeiture through failure to record an affidavit of service of the same within ninety days after the said service, affiant being restrained from so doing by order of the above-entitled Court.

S. SCHULER.

Subscribed and sworn to before me, this 14 day of Dec. 1914.

[Seal]

SYDNEY VAIL PARDEE,

Notary Public in and for Los Angeles County, State of California. [76]

[Indorsed]: Original. No. B. 55—Equity. United States District Court, Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thos. W. Pack et al., Defendants. Filed Dec. 14, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Affidavits of Thos. W. Pack, Stella Schuler and Joseph K. Hutchinson. Pursuant to Rule 49, E. L. Ball, Attorney at law, 737 Consolidated Realty Bldg., Los Angeles, Cal., is hereby designated as the person on whom to

serve papers in this cause. Joseph K. Hutchinson, Attorney for Defendants, San Francisco, Cal. [77]

[Order Continuing Motion to Vacate Injunction Pendente Lite to December 21, 1914.]

At a stated term, to wit; the July Term, A. D., 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the eighteenth day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, et al.,

Defendants.

On the court's own motion, it is ordered that this cause, now upon the calendar, pursuant to notice, for hearing on Saturday, December 19th, 1914, on a motion to vacate and set aside the order heretofore made and entered herein granting an injunction *pendente lite*, be, and the same hereby is continued until Monday, the 21st day of December, 1914, at 10:30 o'clock, A. M., for said hearing. [78]

[Order Denying Motion to Vacate Injunction Pendente Lite, etc.]

At a stated term, to wit; the July Term, A. D., 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-first day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, et al.,

Defendants.

This cause coming on this day to be heard on defendants' motion to vacate the order heretofore made and entered herein granting an injunction *pendente lite*; John B. Clayberg, Esq., appearing as counsel for complainant; Joseph K. Hutchinson, Esq., appearing as counsel for defendants; I. Benjamin being present as shorthand reporter of the proceedings, and acting as such; Now, on motion of John B. Clayberg, Esq., of counsel for complainant, it is ordered that R. P. Henshall, Esq., who is present in court, be, and he hereby is associated with said John B. Clayberg, Esq., as counsel for complainant;

and said motion having been argued, in connection with the argument of a motion for an order vacating and dissolving the temporary restraining order heretofore made, filed and entered in cause No. B. 57 Equity, Cecil C. Carter, Complainant, vs. Thomas W. Pack, et al., Defendants, in support thereof, by Joseph K. Hutchinson, Esq., of counsel for defendants, and in opposition thereto by R. P. Henshall, Esq., and John B. Clayberg, Esq., of counsel for complainant; and said cause having been submitted to the court for its consideration and decision on said motion and the argument thereof; it is now by the court ordered that defendants' motion to vacate the order heretofore made and entered herein granting an injunction *pendente lite* be, and the same hereby is denied; and [79] it is further ordered that complainant be, and he hereby is enjoined from making, executing or delivering conveyance, or in any way conveying or disposing of title to the property involved in this cause during the pendency of this proceeding, and until the final determination of this cause on its merits, counsel for complainant to prepare an appropriate draft of order in accordance herewith for signature. [80]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

**Order Denying Motion to Dissolve Injunction
Pendente Lite, Etc.**

BE IT REMEMBERED, that on the 21st day of December, 1914, at 10:30 o'clock A. M. of said day, at the courtroom of the above-entitled court, in the City of Los Angeles, State of California, pursuant to notice duly given, the motion of the defendants Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, in the above-entitled proceeding for an order vacating the order granting an injunction *pendente lite* in the above-entitled action theretofore, and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant to said order of the 11th day of December, 1914, came on regularly for hearing, and was heard, upon all the papers, records and proceedings in said above-entitled proceeding, upon defendants' Notice of Motion and upon the affidavits of Joseph K. Hutchinson, Thomas W. Pack,

and Stella Schuler on file in the above-entitled proceeding, said defendants appearing by Joseph K. Hutchinson, Esq., their solicitor, and the complainant appearing by J. B. Clayberg, Esq., and R. P. Henshall, Esq., her solicitors, whereupon said motion [81] was argued and after being duly considered by the Court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said motion for an order vacating the order granting an injunction *pendente lite* in the above-entitled proceeding heretofore and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding and for a further order dissolving the injunction *pendente lite* issued pursuant to said order, be, and the same is, denied; it is further ordered, adjudged and decreed that the complainant herein, her attorneys, agents and representatives, or any, or either of them, be, and they are, and each of them is, hereby enjoined and restrained from making, executing or delivering any deed or other conveyance whatsoever, or at all, of the placer mining claims described in the Bill of Complaint on file herein, or any of said claims, or from in any way conveying her or any of her interests in and to said claims until the final determination of this proceeding or the further order of this Court.

Dated, Los Angeles, Cal., December 21, 1914.

BENJAMIN F. BLEDSOE,

Judge. [82]

[Indorsed]: No. B. 55—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E.

Thompson, Complainant, vs. Thomas W. Pack, et al, Defendants. Order Denying Motion to Dissolve Injunction *Pendente Lite*, etc. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants. 923 First National Bank Bldg., San Francisco, Cal. Eq. Order Book. [83]

*In the District Court of the United States, in and for
the Southern District of California.*

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Assignment of Error.

Now come Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, defendants above named, and make and file this their assignment of error.

I.

That the District Court of the United States, in and for the Southern District of California, erred in giving, making and entering its order of December 21, 1914, in the above-entitled proceeding, which said order denied the motion of the above-named defendants for an order vacating the order granting an injunction *pendente lite* in the above-entitled proceeding theretofore and on the 11th day of December,

1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant thereto.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants. [84]

[Indorsed]: No. B. 55—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack, et al, Defendants. Assignment of Error. (Order of Dec. 21, 1914.) Original. Filed. Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [85]

*In the District Court of the United States, in and for
the Southern District of California.*

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Petition for an Order Allowing an Appeal.

The above-named defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, conceiving

themselves aggrieved by the order entered on the 21st day of December, 1914, in the above-entitled proceeding, which said order denied said defendants' motion for an order vacating the order granting an injunction *pendente lite* in the above-entitled action theretofore and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant thereto, do, and each of them does, hereby appeal from said order of the 21st day of December, 1914, to the United States Circuit Court of Appeals, for the Ninth Circuit, and they pray, and each of them prays, that this, their appeal, be allowed; and that a Transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants.

And now, to wit: on December 26, 1914, it is ordered that the foregoing appeal be allowed as prayed for, upon giving bond on appeal in sum of \$250.00.

BENJAMIN F. BLEDSOE,
District Judge. [86]

[Indorsed]: No. B. 55—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., De-

fendants. Petition for and Order Allowing Appeal. (Order of Dec. 21, 1914.) Original. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. Eq. Order Book ———. [87]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That United States Fidelity & Guaranty Company, a corporation, duly incorporated under and by virtue of the laws of the State of Maryland and authorized by its charter and by law to become sole surety on bonds and undertakings, is held and firmly bound unto E. Thompson in the full and just sum of Two Hundred Fifty Dollars (\$250.00) lawful money of the United States, to be paid to the said E. Thompson, her executors, administrators or assigns; to which payment the said United States Fidelity &

Surety Company binds itself by these presents.

IN WITNESS WHEREOF, the United States Fidelity & Guaranty Company has caused these presents to be executed by its duly authorized attorney in fact and has caused these presents to be sealed with the seal of the United States Fidelity & Guaranty Company on this 26th day of December, in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, lately, at a District Court of the United States, for the Southern District of California, Southern Division, in a suit depending in said Court between E. Thompson, as complainant, and Thomas W. Pack, Stella Schuler and Joseph K. [88] Hutchinson as defendants, an order was given on the 21st day of December, 1914, in the above-entitled proceeding, which said order denied the motion of the defendants above named for an order vacating the order granting an injunction *pendente lite* in the above-entitled action *therefore*, and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant to said order of the 11th day of December, 1914, and the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, having obtained or being about to obtain an order allowing an appeal to reverse the said order in the aforesaid suit, and a citation directed to the said E. Thompson citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

within thirty days from the date thereof;

Now, the condition of the above obligation is such that if the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson shall prosecute said

and all F. M. K.
N. P.

appeal to effect ~~an~~ answer ~~of~~ damages and (seal.)
costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

By W. H. SCHRODER, (Seal.)

Its Attorney in Fact.

The additions of the words “and” and “all” in line 19 hereof is made with the full authority of the United States Fidelity & Guaranty Company. W. H. Schroder, Atty. in Fact.

(Margin.) The premium on this bond is 5.00. W. H. Schroder, Atty in Fact. (Two documentary stamps for 21½ cents cancelled by U. S. Fidelity & Guaranty Co. Dec. 24, 1914. [89])

State of California,
County of Los Angeles,—ss.

On this 26th day of December, in the year one thousand nine hundred and fourteen, before me, Frank M. Kelsey, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared W. H. Schroder known to me to be the duly authorized Attorney in Fact of THE UNITED STATES FIDELITY AND GUARANTY COMPANY, and

the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Company, and the said W. H. Schroder duly acknowledged to me that he subscribed the name of THE UNITED STATES FIDELITY AND GUARANTY COMPANY thereto as Principal and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

FRANK M. KELSEY,

Notary Public in and for Los Angeles County, State of California.

[Indorsed]: No. B. 55—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Undertaking on Appeal. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

The form of undertaking and sufficiency of surety approved, this 26th day of December, 1914.

BENJAMIN F. BLEDSOE,

Judge.

CHARLES W. SLACK,

JOSEPH K. HUTCHINSON,

Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [90]

*In the District Court of the United States, in and for
the Southern District of California.*

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Praeceptum for Record Upon an Appeal.

To the Clerk of the District Court of the United
States, in and for the Southern District of Cali-
fornia, Southern Division:

SIR:—You are hereby instructed to prepare a cer-
tified copy of the record in the above-entitled pro-
ceeding for use upon an appeal from the order here-
tofore given, made and entered in the above-entitled
proceeding on the 21st day of December, 1914, deny-
ing the above named defendants' motion for an order
vacating the order granting an injunction *pendente*
lite in the above-entitled proceeding theretofore and
on the 11th day of December, 1914, given, made and
entered in the above-entitled proceeding, and for a
further order dissolving the injunction *pendente lite*
issued pursuant thereto; said record will be made up
of the following papers, records and proceedings in
the above-entitled proceeding:

The bill of complaint therein;

The temporary restraining order and order to

show cause given, made and entered therein on the 24th day of November, 1914;

The minute order given, made and entered in the above-entitled proceeding upon the return of said order to show cause [91] on the 7th day of December, 1914, showing the making of a motion *ore tenus* to dissolve said temporary restraining order, and submitting said application for injunction and said motion;

The minute order given, made and entered in the above-entitled proceeding on the 11th day of December, 1914, granting the said complainant's application for an injunction *pendente lite*;

The order given, made and entered in said proceeding on the 11th day of December, 1914, which said order restrained and enjoined defendants from doing certain acts more particularly described in the bill of complaint above referred to and said order;

The injunction *pendente lite* issued pursuant to said last-named order, which said injunction is dated the 15th day of December, 1914;

The notice of motion of the above-named defendants for an order vacating the order granting an injunction *pendente lite* in the above-entitled proceeding theretofore and on the 11th day of December, 1914, given, made and entered in the above-entitled proceeding, and for a further order dissolving the injunction *pendente lite* issued pursuant thereto, which said notice of motion was filed and is marked as filed in the above-entitled proceeding on the 14th day of December, 1914;

The affidavit of Thomas W. Pack, one of the de-

fendants above named, which said affidavit is referred to in said notice of motion last above named, and which said affidavit was filed and is marked as filed in the above-entitled proceeding on the 14th day of December, 1914;

The affidavit of Stella Schuler, one of the defendants in the above-entitled proceeding, which said affidavit is [92] referred to in said notice of motion last above named, and which said affidavit was filed and is marked as filed in the above-entitled proceeding on the 14th day of December, 1914;

The affidavit of Joseph K. Hutchinson, one of the defendants above named, which said affidavit is referred to in said notice of motion last above named, and which said affidavit was filed and is marked as filed in the above-entitled proceeding on the 14th day of December, 1914;

The minute order of the above-entitled Court continuing said motion last above named from the 19th day of December, 1914, to the 21st day of December, 1914;

The order given, made and entered in the above-entitled proceeding on the 21st day of December, 1914, which said order denied said motion for an order vacating the order granting an injunction *pendente lite* in the above-entitled proceeding and for a further order dissolving the injunction *pendente lite* issued pursuant thereto;

The assignment of error of the above-named defendants filed with their petition for an order allowing the appeal above specified and referred to:

You will forthwith make up your certified copy of

the foregoing papers and transmit the same, with the original petition for an order allowing an appeal and the citation issued thereon, with the return of the service of said citation, to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants. [93]

[Indorsed]: Service of the Within Praecipe for Record on Appeal this 23d day of December, 1914, is hereby admitted.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Complainant.

No. B. 55—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Praecipe for Record upon Appeal, (Order of Dec. 21, 1914.) Original. Filed Dec. 26, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [94]

[Certificate of Clerk, U. S. District Court to
Transcript of Record.]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B. 55—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

I, WM. M. VAN DYKE, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing ninety-four (94) typewritten pages, numbered from 1 to 94 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Bill of Complaint, Temporary Restraining Order and Order to Show Cause, Minute Orders of the 7th, 8th and 11th days of December, 1914, respectively, Opinion of the Court upon making order granting motion for injunction *pendente lite*, Order granting injunction *pendente lite*, Notice of Motion of defendants for order vacating order granting injunction *pendente lite*, and for a further order dissolving injunction *pendente lite*, Affidavits of Joseph K. Hutchinson, Thomas W. Pack, and S. Schuler, respectively, Minute Orders of December 18 and 21, 1914, respectively, Order denying motion for

order vacating order granting injunction *pendente lite*, and for a further order dissolving injunction *pendente lite*, Assignment of Error, Petition for and Order Allowing Appeal, Undertaking on Appeal, and Praecipe for Transcript of Record on Appeal in the above and therein-entitled action; and I do further certify that the above constitute the record on appeal in said action as specified [95] in the said praecipe for transcript of record on appeal, filed on behalf of the appellants in said action.

I do further certify that the cost of said transcript is \$54.20, the amount whereof has been paid me by Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, the appellants in said action.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 30th day of December, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence, the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

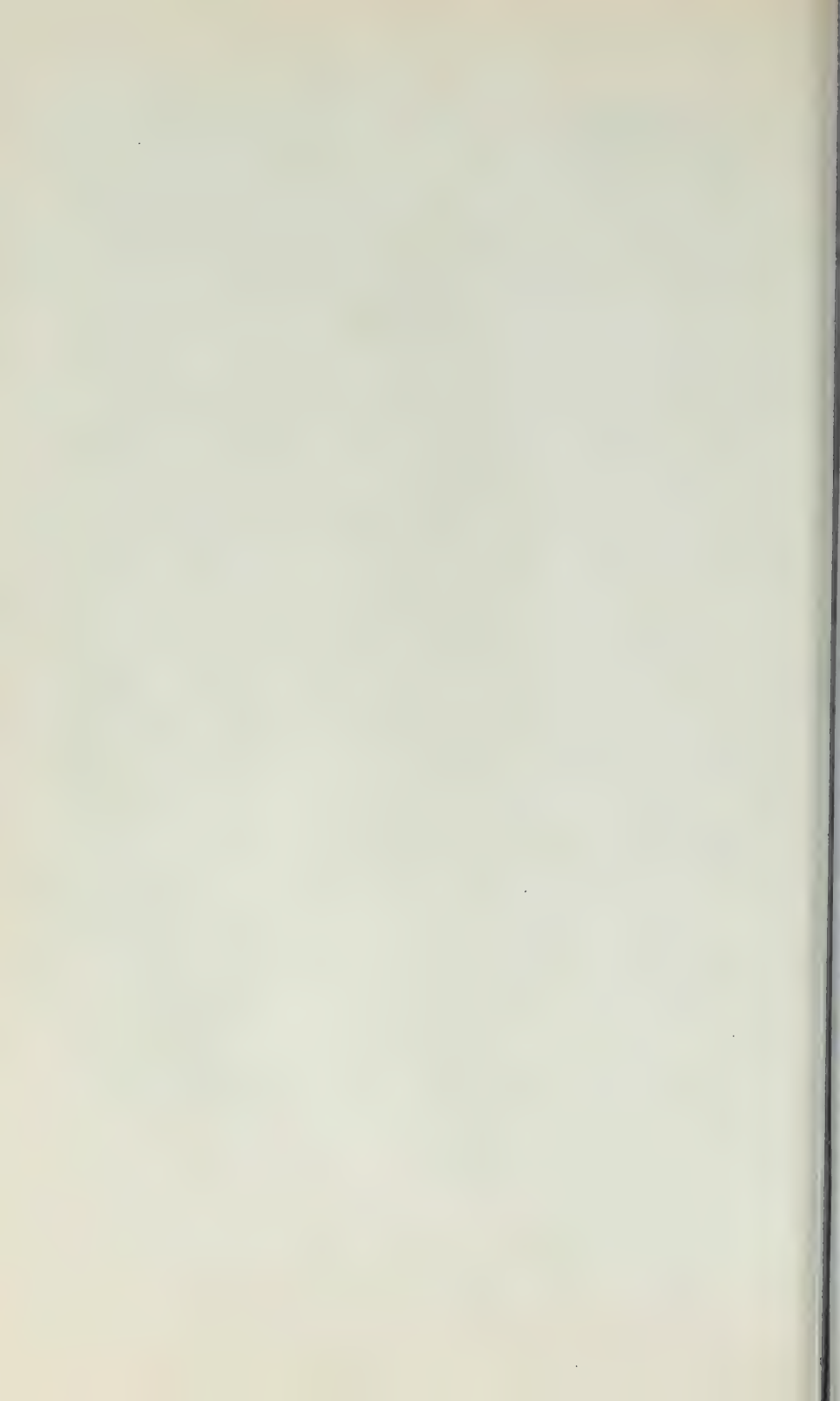
[Ten Cents Internal Revenue Stamp Canceled
Dec. 30, 1914. Wm. M. V. D.] [96]

[Endorsed]: No. 2540. United States Circuit Court of Appeals for the Ninth Circuit. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee. Transcript of Record upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed December 31, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

R. L. SABIN,

Petitioner,

VS.

BLAKE, McFALL COMPANY, a Corporation,
KNIGHT PACKING COMPANY, a Corporation,
HAZELWOOD COMPANY, a Corporation, and WM. H. DRYER and W. W. BOLLAM, Partners Trading as DRYER, BOLLAM & CO.,

Respondents.

In the Matter of EQUAL RIGHTS COMPANY,
INCORPORATED, Alleged Bankrupt.

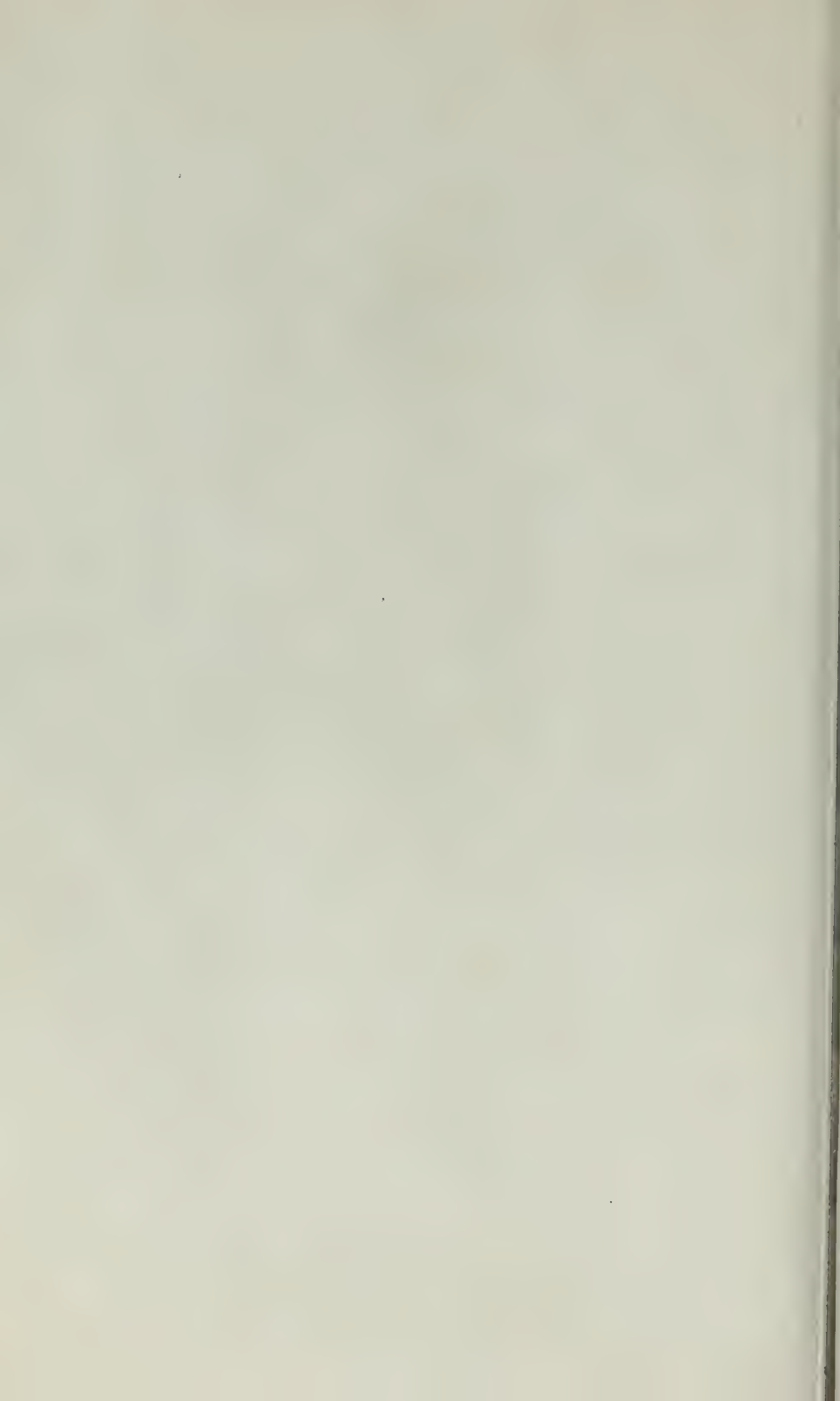
Petition for **R**evision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United
States District Court for the
District of Oregon.

Filed

JAN 23 1915

F. D. Monckton,
Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

R. L. SABIN,

Petitioner,

VS.

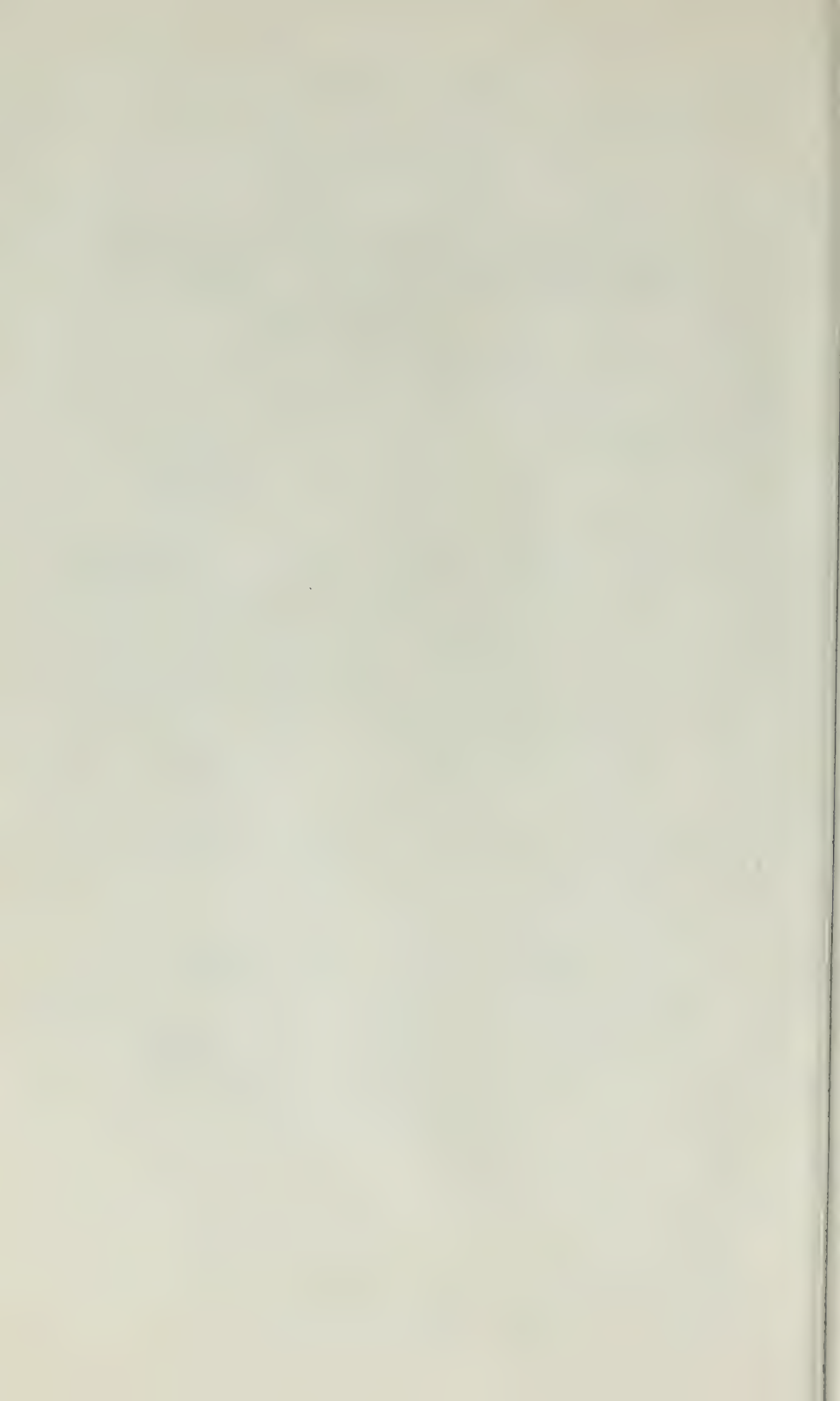
BLAKE, McFALL COMPANY, a Corporation,
KNIGHT PACKING COMPANY, a Corporation,
HAZELWOOD COMPANY, a Corporation, and WM. H. DRYER and W. W.
BOLLAM, Partners Trading as DRYER,
BOLLAM & CO.,

Respondents.

In the Matter of EQUAL RIGHTS COMPANY,
INCORPORATED, Alleged Bankrupt.

Petition for Revision

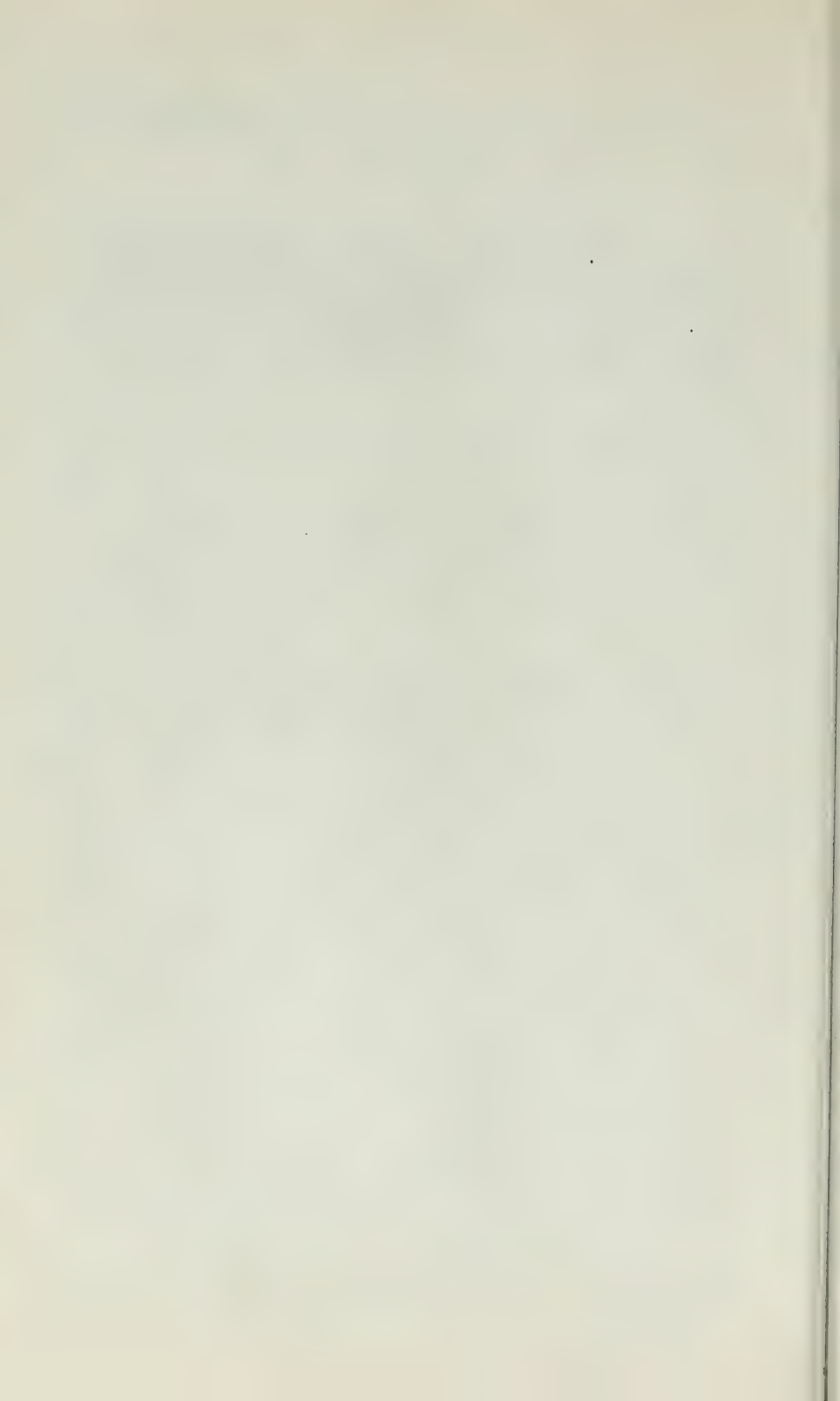
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Approved July 1, 1898, to Revise, in Matter of
Law, a Certain Order of the United
States District Court for the
District of Oregon.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*United States Circuit Court of Appeals for the Ninth
Circuit.*

R. L. SABIN,

Petitioner,

vs.

BLAKE, McFALL CO., a Corporation, KNIGHT
PACKING CO., a Corporation, HAZEL-
WOOD CO., a Corporation, and WM. H.
DRYER and W. W. BOLLAM, Partners
Trading as DRYER, BOLLAM & CO.,

Respondents.

Petition for Revision.

In the Matter of EQUAL RIGHTS COMPANY,
Inc., Alleged Bankrupt.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

The petition of R. L. Sabin, a creditor, respectfully
shows unto the Court:

I.

That on the 8th day of September, 1914, an invol-
untary petition in bankruptcy was filed in the Dis-
trict Court of the United States for the District of
Oregon, by Blake, McFall Co., Knight Packing Co.,
Hazelwood Co., Corporations, and Dryer, Bollan Co.,
a partnership, against Equal Rights Company, Inc.,
a corporation, praying for an adjudication of said
Equal Rights Company, Inc., a corporation, a bank-
rupt.

II.

That on the 17th day of September, 1914, R. L.

Sabin, petitioner herein, presented to the Honorable Judges of the District Court of the United States for the District of Oregon a petition for leave to intervene as a creditor in the above-entitled bankruptcy cause and resist the adjudication as a bankrupt of said Equal Rights Company, Inc., and that upon said petition an order was duly entered on the same day granting said leave to intervene.

III.

That on the 17th day of September, 1914, R. L. Sabin, petitioner herein, moved to dismiss said petition of Blake, McFall Co. et als., and that said motion was duly heard by said court and sustained, and that the said Blake, McFall Co. et als., were, on the 29th day of September, 1914, granted leave upon terms to file an amended petition in bankruptcy therein.

IV.

That on the 13th day of October, 1914, said Blake, McFall Co. et als., filed their amended petition in involuntary bankruptcy in said bankruptcy cause, and that thereafter on the 17th day of October, 1914, R. L. Sabin, petitioner herein, duly filed a motion to dismiss said amended petition of Blake, McFall Co., et als., in said bankruptcy cause, which motion was duly heard by said court and sustained; and that upon request said Blake, McFall Co. et als., were again granted leave to file an amended petition in said cause.

V.

That on the 26th day of October, 1914, said Blake, McFall Co., et als., filed their amended petition in

involuntary bankruptcy in said bankruptcy cause, and that thereafter on the 5th day of November, 1914, said R. L. Sabin, petitioner herein, filed in said bankruptcy cause a motion to dismiss said amended petition, which motion was duly heard by said court and sustained.

VI.

That on the 16th day of November, 1914, the said court upon motion of said Blake, McFall Co. et als., granted unto said Blake, McFall Co. et als., five days within which to file another amended petition in said bankruptcy cause, the said order sustaining the motion to dismiss and granting leave to amend is set forth in the transcript of record filed herewith.

VII.

That on the 23d day of November, 1914, and two days after said five days had expired, said Blake, McFall Co. et al., moved the court *ex parte* for further time to file their said amended petition in bankruptcy, and the court accordingly granted said movants until the 23d day of November, 1914, within which to file their said amended petition; said order granting leave to file said amended petition is set forth in the transcript of record filed herewith.

VIII.

That said amended petition of Blake, McFall Co. et als., which was denominated by them "Second Amended Petition," was not filed on said 23d day of November, 1914, the limit within which leave was granted for the filing of the same, and was not filed until the 25th day of November, 1914, and after the time for filing the same had expired; said amended

petition is set forth in the transcript of record filed herewith.

IX.

That on the 3d day of December, 1914, in said bankruptcy cause, R. L. Sabin, petitioner herein, duly filed a motion to dismiss said amended petition of Blake, McFall Co. et als., denominated as above set forth "Second Amended Petition," a true copy of which motion is set forth in the transcript of record herewith filed.

X.

That on the 24th day of December, 1914, the Honorable R. S. Bean, Judge of the District Court of the United States for the District of Oregon, entered an order denying the said motion to dismiss said petition denominated "Second Amended Petition," said matter having been fully argued before said court, copy of which order is set forth in the transcript of record filed herewith.

XI.

That no proof was taken in connection with the determination of said motion to dismiss and the entire proceeding upon which said dismissal was grounded appears in the transcript of record filed herewith.

XII.

That no opinion was filed by said Court in the matter.

XIII.

That said order denying and overruling said motion to dismiss was erroneous in matter of law because:

1. There is nowhere alleged in said involuntary petition in bankruptcy, with that degree of particularity required in pleading, or at all, that the alleged bankrupt corporation comes within one or more of the permitted classes of corporations made amenable to the involuntary feature of the Bankruptcy Act.

2. The petition does not show or allege the nature of one of the petitioning creditors' claims (that of Dryer, Bollam & Co.), and the statement of the nature of said claim in itself is inconsistent, and without said claim the amount of the petitioning creditors' claims would be below the jurisdictional limit, namely \$500.00.

3. The verification of the petition is not sufficient, nor as provided by the official forms in bankruptcy promulgated by virtue of the Bankruptcy Act of 1898.

4. The last amended petition was not filed within the time allowed by the order granting leave to amend, and order granting further time was not taken until after the original time had expired, and further, said petition was not even then filed until after the time had expired as granted in the order allowing further time.

XIV.

That all the reasons and points above set forth were raised, insisted upon, and argued before said District Court of the United States for the District of Oregon.

WHEREFORE, your petitioner prays that the order of the District Court of the United States for the District of Oregon denying and overruling the

motion to dismiss said amended petition in involuntary bankruptcy entered the 24th day of December, 1914, may be revised and reviewed in matter of law by your Honorable Court, as provided by Section 24-b of the Bankruptcy Act of 1898 and the rules and practice thereunder in such cases made and provided, and that said order be set aside and held for naught, with such directions to the District Court of the United States for the District of Oregon as to this Court may seem proper.

Dated this 28th day of December, 1914.

SIDNEY TEISER,
Attorney for Petitioner.

United States of America,
Dist. and State of Oregon,
County of Multnomah,—ss.

R. L. Sabin, the petitioner mentioned and described in the foregoing petition, does hereby make solemn oath that the statements contained therein are true as he verily believes.

R. L. SABIN,

Subscribed and sworn to before me this 28th day of December, 1914.

[Seal] O. S. CROCKER,
Notary Public for Oregon, Residing at Tigard,
Washington County.

[Endorsed]: No. 2541. United States Circuit Court of Appeals, for the Ninth Circuit. R. L. Sabin, Petitioner, vs. Blake, McFall Co., a Corpn., Knight Packing Co., a Corpn., Hazelwood Co., a Corpn., and Wm. H. Dryer and W. W. Bollam, Part-

ners Trading as Dryer, Bollam & Co., Respondents,
In the Matter of Equal Rights Company, Inc., Al-
leged Bankrupt. Petition for Revision. Filed Dec.
31, 1914. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

R. L. SABIN,

Petitioner,

vs.

BLAKE McFALL COMPANY, a Corporation,
KNIGHT PACKING COMPANY, a Cor-
poration, HAZELWOOD COMPANY, a Cor-
poration, and WM. H. DRYER and W. W.
BOLLAM, Partners Trading as DRYER,
BOLLAM & COMPANY,

Respondents.

EQUAL RIGHTS COMPANY, INC.,

Alleged Bankrupt.

On Review of an Order of the District Court of the
United States for the District of Oregon, Deny-
ing Motion to Dismiss Second Amended Peti-
tion.

Names and Addresses of Attorneys of Record.

SIDNEY TEISER, Morgan Building, Portland, Oregon, for Petitioner.

MANNING, SLATER and LEONARD and BARGE E. LEONARD, Fenton Building, Portland, Oregon, for Respondents.

JOE STEARNS, Washington Building, Portland, Oregon, for Alleged Bankrupt.

In the District Court of the United States, for the District of Oregon.

July Term, 1914.

BE IT REMEMBERED, That on the 26th day of October, 1914, there was duly filed in the District Court of the United States for the District of Oregon, an Answer to the Petition of Petitioning Creditors, in words and figures as follows, to wit: [1*]

In the District Court of the United States, for the District of Oregon.

In the Matter of EQUAL RIGHTS COMPANY, INC., a Corporation,

Alleged Bankrupt.

Answer.

Comes now the said Equal Rights Company, Inc., a corporation, alleged bankrupt, against whom a petition for adjudication in bankruptcy has been

*Page-number appearing at foot of page of original certified Record.

filed herein, and makes the following answer to said petition:

I.

Admits that the alleged bankrupt is a corporation organized and existing under and by virtue of the laws of the State of Oregon with its principal office and place of business in the City of St. Johns, County of Multnomah, and State of Oregon, engaged in the general retail merchandise business in said city, county and State.

II.

Admits that the said corporation owes debts above the sum and in excess of One Thousand (\$1,000.00) Dollars.

III.

Admits that Blake McFall Company, a corporation, night Packing Company, a corporation, Dryer, Bollam Co., a copartnership, and Hazelwood Co., a corporation, petitioning creditors have provable unsecured claims against the Equal Rights Company, Inc., a corporation, which amount in the aggregate to Five Hundred Thirteen and 09/100 (\$513.09) Dollars. [2]

IV.

Admits that on or about the 4th day of September, 1914, in the Circuit Court of the State of Oregon, for the County of Multnomah, in that certain case therein pending in which John Schmauder and Jacob Schmauder were plaintiffs and this corporation, A. Porter, W. H. King, O. Chowning, L. Chowning, Will Wallace and George Wallace were defendants, application was made for the appointment of a Re-

ceiver and the Court being fully advised in the premises appointed a Receiver of the said Equal Rights Company, Inc., a corporation, with the usual power of receivers in like cases, and said receiver being appointed on the ground and for the reason that said corporation was insolvent and unable to pay or meet its obligations which were then due, and defendants property, at a fair valuation is insufficient to pay its debts.

V.

Admits that said corporation is insolvent and unable to pay and meet its obligations which are now past due.

WHEREFORE, and by reason of the foregoing the Alleged Bankrupt, the Equal Rights Company, Inc., a corporation, are willing to be adjudged a bankrupt as prayed for in the creditors amended petition heretofore made and filed herein.

EQUAL RIGHTS COMPANY, Inc.

By E. G. MILLER, Sec.

J. O. STEARNES, Jr.,

Attorney for Alleged Bankrupt.

State of Oregon,

County of Multnomah,—ss.

I, E. G. Miller, Secretary of Equal Rights Company, Inc., a corporation, the answering bankrupt mentioned and described in the foregoing answer, do hereby make solemn oath that the statement of facts contained in such answer are true according to the best of my knowledge, information and belief; and also that the list annexed hereto and herein referred to comprise all the creditors of the said Equal Rights

Company, Inc., a corporation, and their names and addresses so far as are known or can be ascertained.

E. G. MILLER,

Secretary Equal Rights Company, Inc.

Subscribed and sworn to before me this 16th day of October, A. D. 1914.

[Notarial Seal]

VIRGIL L. CLARK,

Notary Public for Oregon.

Filed October 26, 1914. G. H. Marsh, Clerk. [3]

And afterwards, to wit, on the 16th day of November, 1914, there was duly Filed in said Court, an Order Dismissing Petition of Petitioning Creditors and Granting Leave to File Amended Petition, in words and figures as follows, to wit: [4]

In the District Court of the United States, for the District of Oregon.

In the Matter of EQUAL RIGHTS COMPANY,
INC.,

Alleged Bankrupt.

**Order Sustaining Motion to Dismiss Creditors'
Second Amended Petition.**

This cause came on this day to be heard upon motion of R. L. Sabin, respondent, to dismiss the amended petition in involuntary bankruptcy as amended by interlineation, filed herein on the 26th day of October, 1914, by Blake, McFall Co., Knight Packing Company, Dryer, Bollam Co., and Hazelwood Co., for the adjudication of Equal Rights Company, Inc., a bankrupt, and it appearing that said

motion is well taken and made,

IT IS ORDERED that said motion to dismiss said petition in bankruptcy be and the same is hereby sustained, with leave to amend within five days.

Dated this 16th day of November, 1914.

(Signed) R. S. BEAN,
Judge.

Filed November 16, 1914. G. H. Marsh, Clerk.

[5]

And afterward, to wit, on the 23d day of November, 1914, there was duly filed in said Court, an Order Extending Time to File Amended Petition, in words and figures as follows, to wit: [6]

*In the District Court of the United States for the
District of Oregon.*

In the Matter of EQUAL RIGHTS COMPANY,
INC., a Corporation,

Alleged Bankrupt.

**Order [Allowing Petitioning Creditors to November
23, 1914, to File Amended Petition].**

This matter having come on for hearing upon motion of Barge E. Leonard, of attorneys for petitioning creditors in the above-entitled cause, for an order extending the time to and including the 23d day of November, A. D. 1914, in which to file creditors' second amended petition herein, and R. L. Sabin, objecting creditor, appearing by and through his attorney, Sidney Teiser,

And it appearing to the Court that on the 16th

day of November, 1914, a motion to dismiss the petition of petitioning creditors came on for hearing, and petitioning creditors having been given five days in which to file an amended petition herein, and the Court being fully advised in the premises,

IT IS THEREFORE ORDERED that the petitioning creditors be and they are hereby allowed to and including the 23d day of November, 1914, in which to file their amended petition against the above-named alleged bankrupt.

Done and dated this 23d day of November, A. D. 1914.

Witness the Honorable CHARLES E. WOLVERTON, Judge of said Court and the seal thereof, at Portland, in said District, this 23d day of November, 1914.

[Seal]

G. H. MARSH,
Clerk.

Filed November 23, 1914. G. H. Marsh, Clerk.
[7]

And afterwards, to wit, on the 25th day of November, 1914, there was duly filed in said Court, a Second Amended Petition, in words and figures as follows, to wit: [8]

*In the District Court of the United States for the
District of Oregon.*

In the Matter of EQUAL RIGHTS COMPANY,
INC., a Corporation,

Alleged Bankrupt.

Creditors' Second Amended Petition.

To the Honorable CHARLES E. WOLVERTON and the Honorable R. S. BEAN, Judges of the District Court of the United States for the District of Oregon:

The petition of Blake, McFall Company, an Oregon corporation, Knight Packing Company, an Oregon corporation, Hazelwood Company, an Oregon corporation, and Dryer, Bollam & Company, a copartnership; all of said petitioners, except Dryer Bollam & Company being corporations duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with their principal offices and places of business in the City of Portland, County of Multnomah and State of Oregon, and William H. Dryer and W. W. Bollam being copartners doing business under the firm name and style of Dryer, Bollam & Company, with their principal place of business in the City of Portland, County of Multnomah, State of Oregon, respectfully shows:

I.

That the Equal Rights Company, Inc., is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the City of St. Johns, County of Multnomah and State of Oregon, and that said corporation has for the greater part of six months next preceding the date of the filing of the original petition [9] herein had its principal place of business in the said City

of St. Johns, County of Multnomah, State of Oregon and District aforesaid, and as such was engaged in the general retail merchandise business, and that said corporation owes debts in the amount of \$1,000.00 and upwards.

II.

That the said Equal Rights Company, Inc., a corporation, is insolvent and is neither a wage earner, nor a person engaged in farming or tillage of the soil, nor a municipal, railroad, insurance or banking corporation; and that the tangible assets of the said Equal Rights Co., Inc., a corporation, will not exceed the sum of \$1000.00.

III.

That your petitioners are creditors of the said Equal Rights Company, Inc., a corporation, having provable claims against it amounting in the aggregate and in excess of the securities held by them to the sum of \$500.00 and upwards.

IV.

That none of your petitioners are entitled to priority of payment of its said claim within the meaning of Section 64b of the United States Bankruptcy Act and amendments thereof; nor has any of your petitioners received a preference within the meaning of Section 60a-b of such Act as amended.

V.

That the nature and amount of your petitioners' claims are as follows:

Blake, McFall Company, a corporation,
money due on open account for goods

sold and delivered to the Equal Rights Company, Inc., a corporation, from March 5th, 1914, to July 18th, 1914. . . . \$163.67

Hazelwood Company, a corporation, money due on open account for goods sold and delivered to Equal Rights Company, Inc., a corporation, from April 9th, 1914, to May 23d, 1914. 224.64

Forward. \$388.31

[10]

Forward. \$388.31

Knight Packing Company, a corporation, money due on open account for goods sold and delivered to the Equal Rights Company, Inc., a corporation, from December 4, 1913, to July 11, 1914. 44.78

Dryer, Bollam & Company, a co-partnership, money due on open account from Equal Rights Company, Inc., a corporation, upon a stated account rendered July 2d, 1914. 80.00

\$513.09

and that no part of said claims has been paid by said Equal Rights Company, Inc., or by anyone on its behalf, though duly demanded.

VI.

Your petitioners represent that the said Equal Rights Company, Inc., a corporation, while insolvent and within four months next preceding the date of the filing of the original petition herein, to wit: on

or about the 4th day of September, 1914, committed an act of bankruptcy, in that, in a suit instituted in the Circuit Court of the State of Oregon for the County of Multnomah by John Schmauder and Jacob Schmauder, plaintiffs, vs. Equal Rights Company, Inc., a corporation, A. Porter, W. H. King, O. Chowning, L. Chowning, N. C. Bailey, Will Wallace and George Wallace, defendants, upon motion of plaintiffs, for themselves and all other creditors similarly situated against the Equal Rights Company, Inc., a corporation, the alleged bankrupt herein, an order was duly made and entered on the said 4th day of September, 1914, appointing a receiver to take charge of the property of the said Equal Rights Company, Inc., a corporation, for the reason that said Equal Rights Company, Inc., was insolvent, and that the property of the Equal Rights Company, Inc., a corporation, taken at a fair valuation was insufficient to pay its debts, and that in pursuance of said order a receiver, namely, B. K. Knapp, was put in charge of said property of said Equal Rights Company, Inc., under the laws of the State of Oregon and that said B. K. Knapp as receiver duly filed his bond in the sum of \$1,500.00, which bond was duly approved [11] by the Circuit Court of the State of Oregon for the County of Multnomah, and the said B. K. Knapp ever since has been and now is the duly appointed, qualified and acting receiver of said Equal Rights Company, Inc., a corporation, and as such receiver is now in possession of all the assets of said Equal Rights Company, Inc., a corporation, alleged bankrupt.

WHEREFORE your petitioners pray that service of this petition and subpoena be made upon the said Equal Rights Company, Inc., a corporation, as provided by the Acts of Congress relating to bankruptcy as amended, and that it may be adjudged a bankrupt within the purview of said Acts.

BLAKE, McFALL COMPANY,
(Sg.) By F. C. WASSERMAN,
Secy.

KNIGHT PACKING COMPANY,
(Sg.) By W. J. MITCHELL,
Manager.

HAZELWOOD COMPANY,
(Sg.) By CARL SCHALLINGER,
President.

DRYER, BOLLAM & COMPANY,
(Sg.) By W. H. DRYER,
Member of Firm.

SEITZ & CLARK,
MANNING, SLATER & LEONARD,
Attorneys for Petitioners. [12]

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, F. C. Wasserman, Secretary of Blake, McFall Company, a corporation, one of the petitioners above named, do hereby make solemn oath that I am authorized to sign the foregoing petition on behalf of said Blake, McFall Company, and that the statement of facts contained in the foregoing petition is true as I verily believe.

(Sg.) F. C. WASSERMAN.

Subscribed and sworn to before me this 23d day of November, A. D. 1914.

[L. S.] (Sg.) EDWIN W. MORGAN,
Notary Public for Oregon. [13]

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, W. J. Mitchell, Manager of Credits of Knight Packing Company, a corporation, one of the petitioners above named, do hereby make solemn oath that I am authorized to sign the foregoing petition by and on behalf of said Knight Packing Company, and that the statement of facts contained in the foregoing petition is true as I verily believe.

(Sg.) W. J. MITCHELL.

Subscribed and sworn to before me this 23d day of November, A. D. 1914.

[L. S.] EDWIN W. MORGAN,
Notary Public for Oregon. [14]

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, Carl Schallinger, President of Hazelwood Company, a corporation, one of the petitioners above named, do hereby make solemn oath that I am authorized to sign the foregoing petition on behalf of said Hazelwood Company, and that the statement of facts contained in the foregoing petition is true as I verily believe.

(Sg.) CARL SCHALLINGER.

Subscribed and sworn to before me this 23d day of November, A. D. 1914.

[L. S.]

EDWIN W. MORGAN,
Notary Public for Oregon. [15]

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, W. H. Dryer, being one of the partners and a member of the firm of Dryer & Bollam Company, one of the petitioners above named, do hereby make solemn oath that the statement of facts contained in the foregoing petition is true as I verily believe.

W. H. DRYER.

Subscribed and sworn to before me this 23d day of November, A. D. 1914.

[L. S.]

EDWIN W. MORGAN,
Notary Public for Oregon.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

Due service of the within Creditors' Second Amended Petition is hereby accepted in Multnomah County, Oregon, this 23d day of November, 1914, by receiving a copy thereof, duly certified to as such by Marge E. Leonard of Attorneys for Petitioners.

JOE STEARNS,
Attorney for Alleged Bankrupt.
SIDNEY TEISER,
Attorney for Objecting Creditor.

Filed November 25, 1914. G. H. Marsh, Clerk.
[16]

And afterwards, to wit, on the 25th day of November, 1914, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:
[17]

*In the District Court of the United States for the
District of Oregon.*

In the Matter of EQUAL RIGHTS COMPANY,
INC., a Corporation,

Alleged Bankrupt.

**Stipulation [as to Answer to Creditors' Second
Amended Petition].**

IT IS HEREBY STIPULATED by and between Barge E. Leonard, one of the petitioners' attorneys herein, and J. Stearns, attorney for alleged bankrupt, that the answer heretofore filed herein by the said alleged bankrupt to the amended petition herein be and the same is to be considered an answer to the creditors' second amended petition.

Done and dated, Portland, Oregon, this — day of November, 1914.

BARGE E. LEONARD,
Of Attorney for Petitioners.

JOE STEARNS,
Attorney for Alleged Bankrupt.

Filed November 25, 1914. G. H. Marsh, Clerk.
[18]

And afterwards, to wit, on the 3d day of December, 1914, there was duly filed in said Court, a Motion to Dismiss Second Amended Petition, in words and figures as follows, to wit: [19]

In the District Court of the United States for the District of Oregon.

In the Matter of EQUAL RIGHTS COMPANY,
INC., a Corporation,

Alleged Bankrupt.

Motion to Dismiss Petition Denominated as "Second Amended Petition."

Comes now R. L. Sabin, a creditor of the above-named alleged bankrupt, by his attorney Sidney Teiser, Esquire, and moves to dismiss the petition denominated as "Creditors' Second Amended Petition," of Blake, McFall Co., Dryer, Bollam & Co., Knight Packing Co., and Hazelwood Co., filed herein on the 25th day of November, 1914, upon the following grounds:

I.

That it appears on the face of the petition that the Court is without jurisdiction to grant the relief prayed for in said petition.

II.

That said petition does not state facts sufficient to warrant the granting of the relief prayed for therein.

III.

That said petition does not show that the alleged bankrupt is amenable to the provisions of the Bankruptcy Act.

IV.

That the nature of the claim of Dryer, Bollam & Co., one of the petitioning creditors therein, is not properly or fully set forth, and that without the claim of the said petitioning creditor, the jurisdictional amount required to be held by the petitioning creditors by the Bankruptcy Act as amended, viz.: \$500.00, would not be held by said petitioning creditors. [20]

V.

That said amended petition is not verified according to law and the requirements of the Bankruptcy Act of 1898 as amended.

VI.

That said amended petition was not filed within the time allowed by the order permitting the amendment, nor by the order subsequently entered on the 23d day of November, 1914, which date of entry was after the original time had expired.

SIDNEY TEISER,

Attorney for R. L. Sabin, Creditor and Respondent.

State of Oregon,

County of Multnomah,—ss.

I, R. L. Sabin, being duly sworn, depose and say that I am a creditor herein, and that the foregoing Motion to Dismiss is not interposed for delay.

R. L. SABIN.

Subscribed and sworn to before me this 3d day of December, 1914.

[Seal]

H. A. KETTERMAN,
Notary Public for Oregon.

I hereby certify that the foregoing Motion to Dismiss is in my opinion well founded in point of law.

Dated this 3d day of December, 1914.

SIDNEY TEISER,
Attorney for R. L. Sabin, Creditor and Respondent.
United States of America,
State of Oregon,
County of Multnomah,—ss.

Due service of the within Motion to Dismiss is hereby accepted in Multnomah County, Oregon, this 3d day of December, 1914, by receiving a copy thereof, duly certified to as such by Sidney Teiser, Attorney for R. L. Sabin, Creditor and Respondent.

BARGE E. LEONARD,
Of Attorneys for Petitioning Creditors.

Filed December 3, 1914. G. H. Marsh, Clerk.
[21]

And afterwards, to wit, on the 24th day of December, 1914, there was duly filed in said Court an Order Denying Motion to Dismiss Second Amended Petition, in words and figures as follows, to wit: [22]

*In the District Court of the United States for the
District of Oregon.*

In the Matter of EQUAL RIGHTS COMPANY,
a Corporation,

Bankrupt.

**Order Denying Motion to Dismiss Second Amended
Petition of Petitioning Creditors.**

This matter having come on for hearing on the 14th day of December, 1914, on motion of objecting creditor for an order dismissing the second amended petition of petitioning creditors, and after arguments of counsel for and against said motion, in support and against said motion, and the Court having taken the matter under advisement and fully considered all matters in said motion, and the Court being fully advised in the premises,

IT IS THEREFORE ORDERED that the motion of objecting creditor against the second amended petition of petitioning creditors, be, and the same is hereby in all manners and respects denied.

The 24th day of December, A. D. 1914.

(Signed) R. S. BEAN,
Judge.

Filed December 24, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on the 28th day of December, 1914, there was duly filed in said Court, a Notice of Filing Petition for Review, in words and figures as follows, to wit: [24]

United States Circuit Court of Appeals for the Ninth Circuit.

R. L. SABIN,

Petitioner,

vs.

BLAKE, McFALL CO., a Corporation, KNIGHT
PACKING CO., a Corporation, HAZEL-
WOOD CO., a Corporation, and WM. H.
DRYER and W. W. BOLLAM, Partners
Trading as DRYER, BOLLAM & CO.,

Respondents.

In the Matter of EQUAL RIGHTS COMPANY,
INC.,

Alleged Bankrupt.

Notice of Filing Petition for Review.

To Blake, McFall Co., a Corporation, Knight Pack-
ing Co., a Corporation, Hazelwood Co., a Cor-
poration, and Wm. H. Dryer and W. W. Bollam,
Partners Trading as Dryer, Bollam & Co., and
Seitz & Clark and Barge E. Leonard, Their At-
torneys; Equal Rights Company, Inc., and J. O.
Stearns, Jr., Its Attorney.

You are hereby notified that on the 31st day of
December, 1914, I will file in the clerk's office of the
United States Circuit Court of Appeals for the Ninth
Circuit, in the city of San Francisco, California, a

petition for review in the above-entitled cause, a copy of which petition is hereto attached as a part of this notice, and I will then ask to have the case docketed and the necessary order made therein to have said case set down for hearing.

Dated this 28th day of December, 1914.

SIDNEY TEISER,

Attorney for Petitioner. [25]

United States of America,
Dist. and State of Oregon,
County of Multnomah,—ss.

Due service of the within Notice of Filing Petition for Review is hereby accepted in Multnomah County, Oregon, this 28th day of December, 1914, by receiving a copy thereof duly certified to as such by Sidney Teiser, Esquire, attorney for petitioner herein, together with a copy of the Petition for Revision duly certified to as such by Sidney Teiser, Esquire, attorney for Petitioner herein.

BARGE E. LEONARD,

Of Attorneys for Respondents.

J. O. STEARNS,

Atty. for Bankrupt.

Filed December 28, 1914. G. H. Marsh, Clerk.
[26]

And afterwards, to wit, on the 28th day of December, 1914, there was duly filed in said Court, a Stipulation as to Record on Review, in words and figures as follows, to wit: [27]

United States Circuit Court of Appeals for the Ninth Circuit.

R. L. SABIN,

Petitioner.

vs.

BLAKE, McFALL CO., a Corporation, KNIGHT
PACKING CO., a Corporation, HAZEL-
WOOD CO., a Corporation, and WM. H.
DRYER and W. W. BOLLAM, Partners
Trading as DRYER, BOLLAM & CO.,

Respondents.

In the Matter of EQUAL RIGHTS COMPANY,
INC.,

Alleged Bankrupt.

Stipulation [as to Record on Petition for Revision].

It is hereby stipulated by and between R. L. Sabin, Petitioner, and Blake, McFall Co., a corporation, Knight Packing Co., a corporation, Hazelwood Co., a corporation, and Wm. H. Dryer and W. W. Bollam, partners trading as Dryer, Bollam & Co., Respondents, by and through their respective attorneys, that the following papers were all the papers and records used on the hearing and determination of the matter in the District Court of the United States for the District of Oregon, and that the same

are all the record and papers necessary for the consideration and determination of the question presented for review by the petition for revision and review in the United States Circuit Court of Appeals for the Ninth Circuit, and that the same are hereby agreed upon as all the papers, documents, and records to be included in the transcript of record in said cause, viz.:

1. Petition of R. L. Sabin for revision.
2. Order made and entered November 16, 1914, granting leave to Blake, McFall Co. et als., to file amended petition.
3. Order made and entered November 23, 1914, granting further time to Blake, McFall Co. et als., to file amended petition.
4. Answer of alleged bankrupt to first amended Complaint, except list of creditors appended thereto.
5. Stipulation filed Nov. 25th, 1914, between attorney for alleged bankrupt and attorney for petitioning creditors. [28]
6. Petition in involuntary bankruptcy of Blake, McFall Co., Knight Packing Co., Hazelwood Co., and Dryer, Bollam & Co., denominated "Second Amended Petition," filed in said bankruptcy cause.
7. Motion of R. L. Sabin to dismiss, filed December 3, 1914.
8. Order made and entered the 24th day of December, 1914, denying said motion to dismiss.
9. Notice of presentation of petition for revision and proof of service thereon.

10. This stipulation designating papers for record on such review.

SIDNEY TEISER,

Attorey for Petitioner.

BARGE E. LEONARD,

Of Attorneys for Respondents.

Filed December 28, 1914. G. H. Marsh, Clerk.
[29]

**[Certificate of Clerk U. S. District Court to
Transcript of Record on Petition for Revision.]**

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 29 constitute the transcript for review by the United States Circuit Court of Appeals for the Ninth Circuit of the Record and Proceedings, had in the District Court of the United States for the District of Oregon in the Matter of the Equal Rights Company, Incorporated, a corporation, alleged bankrupt; that said transcript has been prepared in accordance with the stipulation of the parties filed in said proceedings, and is a true and complete transcript of the said record and proceedings, in accordance with said stipulation.

And I further certify that the cost of the foregoing transcript is \$12.60 and that the same has been paid by the objecting creditor.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland in said District this 29th day of December, 1914.

[Seal]

G. H. MARSH,
Clerk.

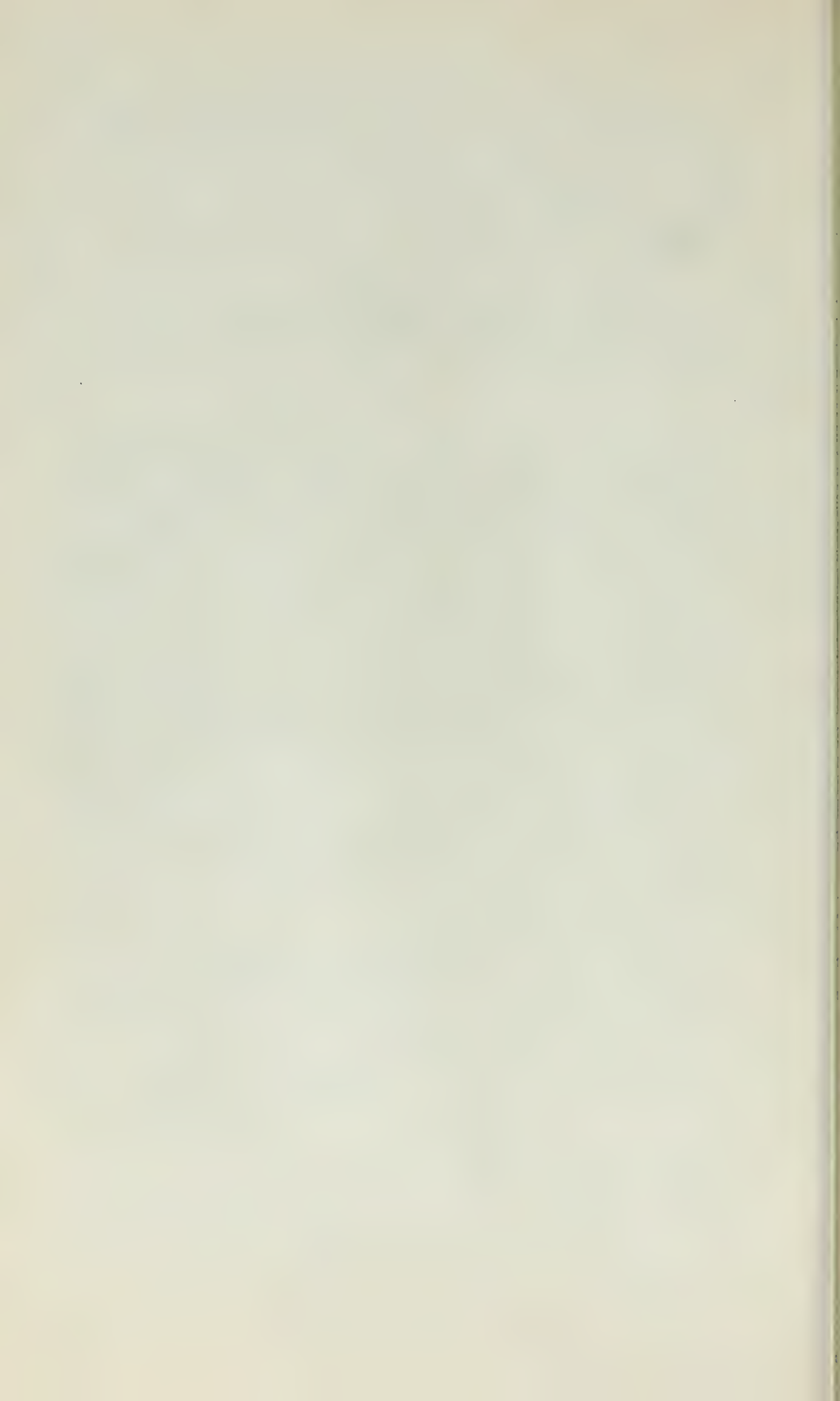
[Ten Cents Internal Revenue Stamp. Canceled
Dec. 29, 1914. G. H. M.] [30]

[Endorsed]: No. 2541. United States Circuit Court of Appeals for the Ninth Circuit. R. L. Sabin, Petitioner, vs. Blake, McFall Company, a Corporation, Knight Packing Company, a Corporation, Hazelwood Company, a Corporation, and Wm. H. Dryer and W. W. Bollam, Partners Trading as Dryer, Bollam & Co., Respondents. In the Matter of Equal Rights Company, Incorporated, Alleged Bankrupt. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Oregon.

Filed December 31, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



NO. 4451

**United States
Circuit Court of Appeals
For the Ninth Circuit**

R. L. SABIN,

Petitioner,

vs.

BLAKE, McFALL CO., a Corporation,
KNIGHT PACKING CO., a Corporation,
HAZELWOOD CO., a Corporation, and
WM. H. DRYER AND W. W. BOLLAM,
Partners Trading as DRYER, BOLLAM & CO.,
Respondents.

In the Matter of Equal Rights Company, Inc.,
Alleged Bankrupt.

BRIEF OF PETITIONER.

Petition for Revision of a certain order of the United
States District Court for the District of Oregon.

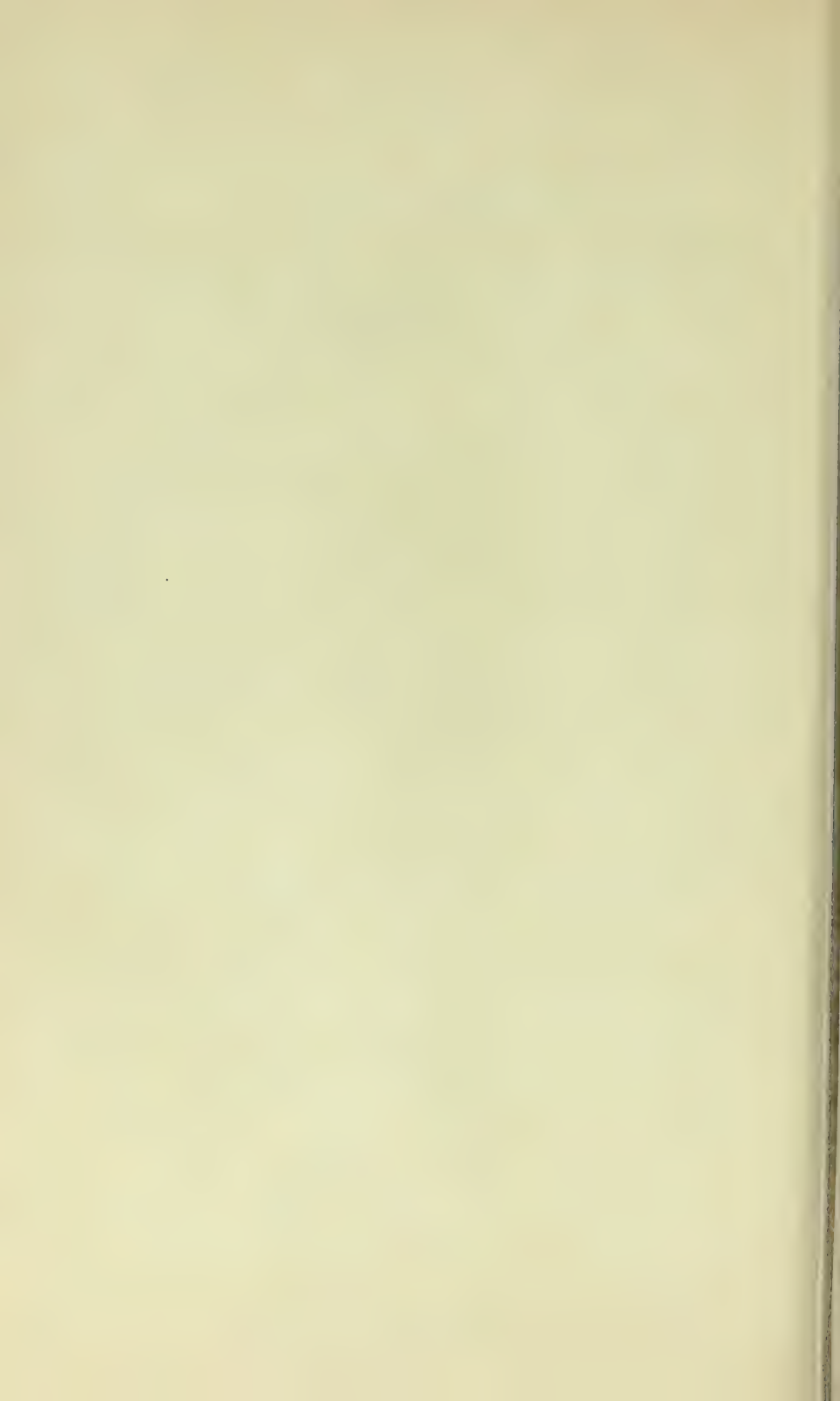
SIDNEY TEISER, Attorney for Petitioner.

SEITZ & CLARK and BARGE E. LEONARD,
Attorneys for Respondents.

Filed

FEB 1 - 1915

F. D. Monckton,
Clerk.



**United States
Circuit Court of Appeals
For the Ninth Circuit**

R. L. SABIN,

Petitioner,

vs.

BLAKE, McFALL CO., a Corporation,
KNIGHT PACKING CO., a Corporation,
HAZELWOOD CO., a Corporation, and
WM. H. DRYER AND W. W. BOLLAM,
Partners Trading as DRYER, BOLLAM & CO.,
Respondents.

In the Matter of Equal Rights Company, Inc.,
Alleged Bankrupt.

BRIEF OF PETITIONER.

Petition for Revision of a certain order of the United
States District Court for the District of Oregon.

STATEMENT OF THE CASE.

On the 8th day of September, 1914, an involuntary petition in bankruptcy was filed in the District Court of the United States for the District of Oregon by certain petitioning creditors, respondents herein, praying for the adjudication in bankruptcy of the Equal Rights Company, Inc., a corporation. R. L. Sabin, the peti-

tioner herein, having asked for and obtained leave to intervene as a creditor in the bankruptcy proceedings, filed therein a motion to dismiss the involuntary petition. The motion was heard by the court and sustained. Whereupon, the petitioning creditors asked for and obtained leave to file an amended petition, and accordingly, on the ^{26th} ~~18th~~ day of ^{September} ~~November~~, 1914, they filed such amended petition. Thereafter R. L. Sabin, the petitioner herein, filed a motion to dismiss said amended petition, which motion was duly heard by the court and sustained. The petitioning creditors again asked for and obtained leave to file a second amended petition, and said petition was accordingly filed on the 26th day of October, 1914. R. L. Sabin, petitioner herein, again moved to dismiss, and the motion was accordingly sustained, by an order entered the 16th day of November, 1914, in which order the court granted to said petitioning creditors five days within which to file a third amended petition. The time, therefore, within which said amended petition under said order should have been filed, expired on the 21st day of November, 1914; and no petition had then been filed. However, on the 23d day of November, 1914, two days after the time had expired within which the petitioning creditors were granted leave by said order to file their third amended petition, respondents moved the court, ex parte, for further time within which to file their amended petition, the bench at that time being occupied by a judge other than the one granting the former order, and the court then granted said movants until the 23d day of November, 1914, within which to file their said third amended petition.

The two orders are set forth in the Transcript of Record, pages 11 and 12 respectively.

However, the petitioning creditors, respondents herein, did not even then file their amended petition within the time limited in the second order, and did not file the same until the 25th day of November, 1914. Whereupon, on the 3d day of December, 1914, R. L. Sabin, petitioner herein, filed his motion to dismiss said third amended petition, (Transcript of Record, p. 22), which third amended petition, denominated by petitioning creditors "Second Amended Petition," is set forth in the Transcript of Record, p. 14. The motion to dismiss was based essentially upon the same grounds as are hereinafter set forth as specification of errors to be relied upon herein.

In the involuntary petition last filed by the petitioning creditors, the only allegation as to the character of the corporation prayed to be adjudged a bankrupt appears in that portion of the petition setting forth its location and the duration of its principal place of business, wherein it is stated that said corporation "as such was engaged in the general retail merchandise business." (See paragraph I of said petition, Transcript of Record, p. 15.) The petition does not allege or show the nature of one of the petitioning creditors' claim, that of Dryer, Bollam & Co., except as follows:

"Money due on open account from
Equal Rights Co., Inc., a corporation, up-
on a stated account rendered July 2,
1914,"

(Transcript of Record, p. 16), and the verification of

each of the creditors to said petition is that the statement of facts contained in the petition "is true as I *verily believe*." (Transcript of Record, pp. 18, 19 and 20.)

QUESTIONS INVOLVED UPON REVIEW.

The questions involved in this review are:

1. SHOULD NOT THE MOTION TO DISMISS THE THIRD AMENDED PETITION HAVE BEEN SUSTAINED WHERE SAID THIRD AMENDED PETITION WAS FILED, UNDER THE CIRCUMSTANCES NARRATED ABOVE, AFTER THE TIME ALLOWED BY THE FIRST ORDER GRANTING LEAVE TO AMEND HAD EXPIRED, AND AFTER THE EXPIRATION OF THE TIME LIMITED IN THE SECOND ORDER (WHICH ORDER IN ITSELF WAS TAKEN AFTER THE TIME GRANTED IN THE FIRST ORDER HAD EXPIRED) ?

2. SHOULD NOT THE MOTION TO DISMISS THE THIRD AMENDED PETITION HAVE BEEN SUSTAINED WHERE THE SAID PETITION DOES NOT STATE, EO NOMINE, OR IN EFFECT THAT THE CORPORATION PRAYED TO BE ADJUDGED A BANKRUPT WAS A "MONEYED, BUSINESS OR COMMERCIAL CORPORATION," BUT MERELY STATES THAT THE CORPORATION WAS "ENGAGED IN THE GENERAL RETAIL MERCHANDISE BUSINESS," AND DOES NOT STATE THAT IT WAS PRINCIPALLY SO ENGAGED, AND DOES NOT NEGATE THAT IT WAS A RELIGIOUS, EDUCATIONAL, CHARITABLE OR NON-COMMERCIAL CORPORATION ?

3. SHOULD NOT THE MOTION TO DISMISS THE THIRD AMENDED PETITION HAVE BEEN SUSTAINED WHERE THE SAID THIRD AMENDED PETITION DOES NOT SET FORTH WITH CONSISTENCY AND CLEARNESS THE CHARACTER OF A PETITIONING CREDITOR'S CLAIM, ESPECIALLY WHERE, IF SAID PETITIONING CREDITORS CLAIM WERE ELIMINATED, THE JURISDICTIONAL AMOUNT OF FIVE HUNDRED DOLLARS WOULD BE LACKING?

4. SHOULD NOT THE MOTION TO DISMISS HAVE BEEN SUSTAINED BECAUSE THE VERIFICATION TO THE THIRD AMENDED PETITION WAS MERELY UPON BELIEF AND NOT UPON KNOWLEDGE?

SPECIFICATIONS OF ERRORS.

As already intimated, the errors relied upon by petitioner herein, and which are intended to be urged in this petition for review, being the same errors as set forth in the assignment of errors contained in the Transcript of Record, p. 5, are that the order denying and overruling the motion to dismiss was erroneous in matter of law because:

1. The third amended petition was not filed within the time allowed by the order of November 16, 1914, granting leave to amend, and the order of November 23, 1914, granting further time, was not taken until after the time allowed to amend by said former order had expired; nor was said amended petition filed even then until after the expiration of the time limited by said latter order of November 23, 1914.

2. There is nowhere alleged in said involuntary pe-

tition in bankruptcy, with that degree of particularity required in pleading, or at all, that the alleged bankrupt corporation comes within one or more of the permitted classes of corporations made amenable to the involuntary fetaure of the bankruptcy act.

3. The petition does not show or allege with the particularity required in pleading the nature of the claim of one of the petitioning creditors (that of Dryer, Bol-lam & Co.), and the statement of the nature of said claim is in itself inconsistent; and without said claim the amount of the petitioning creditors' claims would be below the jurisdictional limit, namely \$500.00.

4. The verification of the petition is not sufficient, nor as provided by the official forms in bankruptcy promulgated by virtue of the Bankruptcy Act of 1898, as amended.

DISCUSSION.

An outline of the questions involved has been given already with sufficient detail, and it will not again be here repeated, but we shall proceed with a discussion of the law involved under the various contentions. Taking up then, the questions under the heads outlined in the assignment of errors:

SHOULD NOT THE MOTION TO DISMISS
HAVE BEEN SUSTAINED BECAUSE THE THIRD
AMENDED PETITION WAS NOT FILED WITHIN
THE TIME LIMITED BY THE ORDER GRANT-
ING LEAVE TO FILE AND THE ORDER EXTEND-
ING SAID TIME?

It will first be noted that there had been filed in this matter prior to the last amended petition, three petitions, each of which had successively been held by the court to have been faulty, and the petitioning creditors had upon three occasions prior to this motion been granted leave to amend their faulty petitions. The fourth application for leave to amend was made at the time that the motion to dismiss the third petition was sustained. No petition had ever been presented stating the cause of the error in the prior petitions, as prescribed by General Order 11 of the Bankruptcy Act, and while it is not contended that the court did not have jurisdiction without the filing of such petition to permit amendments, yet where the amendment is allowed without an assignment of the cause of the error in the faulty petition, it is urged that the amendments should be permitted to be filed with less readiness than if such petition had been filed. The court, in the order sustaining the petition to dismiss, added to the words of the order dismissing the petition the words "with leave to amend within five days." (Transcript of Record, p. 12.) The amendment, as heretofore stated, was not filed within the five days, and on the seventh day an order was obtained from the court (the bench being occupied at the time by a judge unfamiliar with the proceedings already had, and of course, other than the judge granting the original order) permitting the amendment to be filed up to and including the 23d day of November, 1914, (Transcript of Record, p. 13); *but the amendment was not even then filed within the time limited in the second order.* It is con-

tended that this second order, entered *after* the time limited in the original order had expired, was beyond the jurisdiction of the court to make, and that even had it been complied with, the petition should not have been allowed to have been filed; but this question need not be argued, since the petition was *not filed even within the time specified within the latter order*. It is earnestly contended that by virtue of the order of November 16, 1914, the involuntary petition on the fifth day from the entering of said order was in itself dismissed, unless there had been filed on that date the amended petition, or unless an order had been entered *prior* to the expiration of that day extending the time to file said amended petition, and said amended petition had been filed within the time so extended. In other words, the order was a dismissal of the petition, which dismissal was to become a final order on the fifth day thereafter unless an amended petition had *within that time been filed*; and certainly, even admitting that the order of November 23, 1914, was a proper order and extended the time to and until the 23d day of November, 1914, *unless the amended petition had been filed within the time limited in that order, the order dismissing the petition of November 16, 1914, then became a final order*.

A case very much in point, and even stronger than the case at bar, is that of *Brown v. Easterling*, 59 S. C. 472, (38 S. E. 118). There a demurrer to a complaint was sustained and leave was given to plaintiff to file an amended complaint "within twenty days from this date." The complaint was not filed within the time and after the expiration of the same an order was pro-

cured from a succeeding judge of the same court granting five days from the date of the latter order to file the amended complaint, from which order the defendant appealed. Said the court, after stating the facts:

“In this case when the demurrer was sustained, that was the end of the case, and the defendant could have entered judgment thereon, unless the plaintiff availed herself of the privilege, granted by Judge Townsend’s order (the first order) of serving an amended complaint within the time limited for such purpose by said order, and having failed to do so, the defendant could, upon the expiration of such time, have entered judgment upon the demurrer, and hence the order became a final order, which no other Circuit Judge had any power to modify (p. 478). . . . If these attorneys found that they could not prepare and serve the amended complaint within the time prescribed by the order of Judge Townsend . . . their remedy was to apply to Judge Townsend before the twenty days expired for an extension of the time allowed.” (p. 482.)

The court, therefore, held that the lower court erred in making the second order, and therefore that the amended complaint was improperly filed.

Another case also in point is that of *Haight v. Schuck*, 6 Kan. 192, 198. There a petition was filed and summons served upon the plaintiff in error, Haight, defendant below, who did not answer within the time required and was in default, but plaintiffs did not take judgment, but asked leave to amend their petition and were granted leave to file same “within ten days.” They failed to file the amended petition, at least, within the

time allowed. Judgment was rendered upon default in favor of the plaintiff, to which Haight, the defendant below, appealed, taking the position that since the amended petition was not filed within the time allowed, there was nothing of record upon which to base a judgment by default, and that the so-called amended petition was a nullity. Said the court:

“If the plaintiffs failed to file such amended petition within the time fixed by the court, they would then have had no right and should not have been allowed to file it at all, unless by further order of the court, and in case of such failure and no further order being obtained, they would have been referred to and must have relied upon the original petition.”

The appellate court then held that not having amended his complaint within the time allowed, his rights would be referrable to the original complaint, and Haight, not having answered that, default was proper against him upon the original complaint.

There are several cases not directly in point, the language of which, however, enunciates the principle of law herein contended for. These cases are:

Waller v. Clarke, 132 Ga. 830; 64 S. E. 1096.

Carter v. Page (Cal.), 20 Pac. 729.

Vestal v. Young, 82 Pac. 381; 147 Cal. 715.

In the first of these cases an order was made sustaining the demurrer to a petition and granting plaintiff thirty days within which to file an amended petition. The thirty days expired before the amended petition was filed, and application was made to the court to grant

leave to file the amended petition, which application the court denied; whereupon, the plaintiffs appealed. In discussing the question, the appellate court, in the course of its opinion, said:

“The court committed no error in refusing to re-open the case and allowing the plaintiff to amend. When the order . . . was passed that the petition be dismissed unless the plaintiff amended within thirty days, the plaintiff ought to have accepted, or excepted, but it did neither. It did not accept the terms of the order by offering an amendment within thirty days, nor did it except by filing exceptions within the time required.”

The court therefore held that the order allowing the plaintiff to amend merely gave the plaintiff the privilege to amend to prevent dismissal, and under the facts in this case this order was a final order.

In *Carter v. Page* (Cal.), 20 Pac. 729, the court held that the fact that the amended complaint was not filed within the ten days allowed, but was filed thereafter, could not be taken advantage of upon an appeal upon the merits, but that it could be reviewed only upon a record made on motion in the court below to set aside the judgment based on such complaint, and on an appeal from an order denying such motion; from which can be clearly inferred that had the matter been brought properly to the attention of the appellate court, the court would have held that the amended complaint was improperly filed.

And in *Vestal v. Young*, 82 Pac. 381, 147 Cal. 715, the court there, passing upon a situation which was the

converse of the situation arising in *Brown v. Easterling*, 59 S. C. 472 (38 S. E. 118), heretofore discussed, held that where time was given to amend a complaint the court had jurisdiction *before* the expiration of the time so given, to grant successive orders extending the time, from which the inference is to be drawn that had the court not granted the successive orders *before* the expiration of the time given within which to file the amendments, the successive orders would have been improper.

It may be stated that careful search has been made of the cases, and that no case has been found wherein it is held upon similar facts to the case at bar that an amendment pleading was proper to be filed.

It is, therefore, respectfully urged that the failure of petitioning creditors to amend within the time granted and extended put the petitioning creditors out of court and that they had no standing whatsoever when they attempted to file and did file the so-called amended petition; and the third amended petition, denominated "Second Amended Petition" by petitioning creditors, should have been dismissed because improperly filed. Having already been finally disposed of under the order of November 16, which order became a final order on November 23, upon petitioning creditors' failure on that date to file their third amended petition, the court erred in not dismissing the petition filed after the time limited and extended had expired.

If this court sustain the position taken by the petitioner herein, and it is confidently believed that it will, this brief might well end here. However, assuming for the argument's sake, that this position of petitioner

herein is without merit, although the assumption is difficult, we will proceed with the other errors assigned, any one of which, if well taken, must result in a revision of the order of the District Court. Proceeding, therefore, with the discussion.

THE PETITION DOES NOT ALLEGE THAT THE CORPORATION IS SUCH AS IS AMENABLE TO THE INVOLUNTARY FEATURE OF THE BANKRUPTCY ACT.

It is a fundamental rule of pleading that in a pleading "that construction shall be adopted which is most unfavorable to the party pleading."

Tyler's Stephen on Pleading, p. 333.

Chitty on Pleading (16th Ed.), p. 337.

Of course, the "petition in bankruptcy is a pleading, and should conform to the usual rules of pleading in the manner of statement."

Remington on Bankruptcy, Sec. 251, p. 191.

In re Farthing, 29 Am. B. R. 732, 738; 202 Fed. 557, 562.

Clark v. Henne & Meyer, 11 Am. B. R. 583; 127 Fed. 288, 296, (C. C. A. 5th Cir.)

As stated by Collier in his work on bankruptcy:

"If the petition be against the corporation it must distinctly allege that it comes within one or more of the permitted classes. The amendment of 1910, extending the law to practically all business and commercial corporations, has not modified the application of this rule. It should still be clearly alleged in the petition that the corporation is a moneyed, business or commercial corporation."

Collier on Bankruptcy (10th Ed.), p. 134.

Black on Bankruptcy, Sec. 132, p. 322.

Remington on Bankruptcy, Sec. 242, p. 186.

Does the petition at bar come within these principles of pleading?

Before entering into a discussion of this question, however, it should be recalled that courts of bankruptcy are courts of limited jurisdiction, their jurisdiction being bounded by the Bankruptcy Act.

Collier on Bankruptcy, 10th Ed., p. 23.

Loveland on Bankruptcy, 4th Ed. Sec. 191, pp. 396, 397.

All the requisites therefore enumerated in the Bankruptcy Act for the adjudication of an involuntary bankruptcy, should clearly appear in the petition.

The involuntary petition in this case alleges, in paragraph I thereof, that the Equal Rights Company, Inc., is duly incorporated under the laws of the State of Oregon, with its principal office in the City of St. Johns, Multnomah County, Oregon; that the corporation has for the greater portion of six months next preceding the date of the filing of the original petition had its principal place of business in the district of Oregon, "and as such was engaged in the general retail merchandise business," and further alleges, in paragraph II thereof, that it was neither a wage earner nor a person engaged in farming or the tillage of the soil (*quære*) and was not a "municipal, railway, insurance or banking corporation."

It is maintained that the allegations as above set

forth are demurrable, and that the petition to dismiss (which under the new equity rules supplants a demurrer) should have been sustained. It will be noted that it is not alleged that the corporation was *principally* "engaged in the general retail merchandise business," which might even under the Act as amended be sufficient in this instance, nor is it anywhere alleged that it was a "moneyed, business, or commercial corporation."

Fortunately, a case very much in point arose in Oregon under the Bankruptcy Act of 1867. (The applicability of the decisions concerning involuntary corporate bankrupts under that Act to the proper interpretation of the like section of the present Act will be hereafter fully discussed). In that case the petition alleged that the Oregon Bulletin Printing and Publishing Company was a private corporation formed under the laws of Oregon, and that its principal place of business was in Multnomah County, and it was argued that these allegations taken together with the fact that the name of the corporation indicated clearly that it was organized for the purpose of engaging in and carrying on the business of publishing and printing, showed sufficiently that it was a business corporation. The question first arose upon requested instructions to the jury called to try the question of insolvency, and it was held by the trial judge, the late Judge Deady, who expressed some doubts as to the correctness of his ruling, that the petition having been answered and the point not raised in the pleadings, it was too late to take advantage of the point at that stage of the issue. See *In re Oregon Bulletin Printing*

& Pub. Co., *Fed. Case No. 10559, 18 Fed. Cas., p. 773, 780, (first column.)*

The case was appealed to the Circuit Court upon this and other questions, *Oregon Bulletin Printing & Pub. Co., Fed. Case No. 10561, 18 Fed. Cas., p. 780, 791*, and there Circuit Judge Sawyer held that whether or not the ruling of the trial judge was correct as to the timeliness of raising the question, the petition undoubtedly was demurrable. Said Judge Sawyer (at p. 791, first column) :

“There is no allegation in the petition in this case, that the corporation is either a ‘moneyed, business or commercial corporation,’ and the character of the corporation can only be inferred from the name and averment that its place of business is at Portland. The petition would undoubtedly be held bad on demurrer.”

Now discussing for a moment the successive bankruptcy acts and amendments so as to call the attention of the court to the successive changes in this particular phase of the bankruptcy acts, it will be recalled that section 37 of the Bankruptcy Act of 1867 made “all moneyed, business or commercial corporations and joint stock companies,” without exception, subject to the compulsory feature of the Bankruptcy Act, while the Act of 1898 provided that any corporation “engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits” may be adjudged an involuntary bankrupt, and by the amendment of 1903 mining corporations were included in the provision.

However, because of the unsatisfactory and unequal

applicability of this law to various corporations, as developed in practical operation, Congress modified and enlarged the provision and more nearly assimilated it to the law of 1867, correcting some of its harsher features by specifically excepting certain classes of corporations, so that the present Act, as amended in 1910, is practically the same as that of 1867, so far as involuntary bankruptcy of corporations is concerned, and reads as follows:

“Any moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation . . . may be adjudged an involuntary bankrupt.”

The phrase, therefore, “moneyed, business or commercial corporation” (but not the exceptions which follow) being directly copied from the Bankruptcy Act of 1867, shows the intention of Congress that it should have the same interpretation which it then bore.

Black on Bankruptcy, Sec. 141, p. 347.

Hence the definitions and decisions made concerning it by the Federal Court when administering the earlier statute, are now binding authority.

Black on Bankruptcy, Sec. 141, p. 347.

*In re R. L. Radke Co. (Dist. Ct. N. D. Cal.),
27 Am. B. R. 950; 193 Fed. 735.*

Therefore, turning to the decisions, which, however, are not numerous in this regard, under the Act of 1867, we find that certain classes of corporations were not then amenable to the involuntary features of the Bankruptcy Act, and therefore that they are not now amen-

able to it under the present Act (disregarding, for the time being, the exceptions mentioned in the amendment of 1910). For example, it was held under the former act that "corporations not organized for profit, viz.: religious, charitable, literary, educational, municipal and political corporations" could not be adjudged involuntary bankrupts because they were not "moneyed, business or commercial corporations."

Black on Bankruptcy, Sec. 142, p. 349.

Winter v. Iowa M. & N. P. Ry Co., Fed. Case No. 17890, 30 Fed. Cas., 329, 330.

Alabama & Chattanooga R. Co. v. Jones, Fed. Case No. 126, 1 Fed. Cas. 275, 278, (first column.)

Sweatt v. Boston H. & E. R. Co., Fed. Case No. 13684, 23 Fed. Cas., 530, 534, (first column.)

Said the court in the case of *Winter v. Iowa M. & N. P. Ry. Co., Fed Case No. 17890, 30 Fed. Cas., 329, (first column)* :

"In my judgment the purpose of Congress in the use of the language above quoted from section 37 (Act of 1867), was to include all corporations of a private nature, organized for pecuniary profit . . . and would exclude corporations of a public, civil or municipal character, as well as those organized purely and strictly for religious, charitable, educational and like purposes."

Now, leaving general principles and returning to the case at bar, it is contended that the allegation that the Equal Rights Company, Inc., was "engaged in the general retail merchandise business" does not bring it into

the class of "moneyed, business or commercial" corporations, for the reason that the Equal Rights Company, Inc., may be a philanthropic organization and still be engaged in the "general retail merchandise business" incidentally. The least allegation that would bring this corporation under the Act would be that it was *principally* so engaged, but this allegation is not in the petition. As just stated, the Equal Rights Company, Inc., may be a charitable or educational organization and yet incidentally and spasmodically may engage in the "general retail merchandise business." Just, for instance, as Reed College, an educational corporation of the State of Oregon, is unquestionably engaged in the rental business, owning numerous business and residential properties which it holds as its endowment, and from the income of which it exists, and yet that corporation would not be amenable to involuntary bankruptcy. Leland Stanford University, as an incident to its educational purposes, may, and it is believed does, conduct a store for the sale and purchase of text books and stationery for the convenience of its students, and if it does so conduct such a store, it would certainly be engaged in the "general stationery business," and yet, conducting this business incidentally, it would not be amenable to involuntary bankruptcy. Numerous universities for educational purposes operate printeries, publish and sell books, tracts, magazines and even newspapers, and therefore engage in the general publishing business, as a part of their general educational purpose, but it need not be asserted that such universities are not "moneyed, business or commercial corporations," and hence not amenable to the involuntary bankruptcy phase of the Act.

It is therefore concluded that the allegation contained in the petition at bar is not such an allegation as is required by the rules of pleading already adverted to, and that the petition is therefore demurrable.

In the case of *Sweatt v. Boston H. & E. R. Co.*, *Fed. Case No. 13684*, *23 Fed. Cas.*, 530, 534, (first column), discussing the amenability of a railroad corporation to the involuntary features of the Act of 1867, it is said:

“Religious, charitable, literary and educational corporations are not subject to the Bankrupt Act, nor are corporations created for political purposes, even though they or some of them may transact large amounts of business, as their chief and ultimate purpose shows that they are not properly denominated moneyed, business nor commercial corporations.”

And in the case of *Alabama & C. R. Co. v. Jones*, *Fed. Case No. 126*, *1 Fed. Cas.*, 275, 278, (first column), in discussing the question as to whether a railway corporation is subject to be adjudged an involuntary bankrupt under the Act of 1867, it is said:

“It seems to be the clear intent of the thirty-seventh section to bring within the scope of the bankrupt act all corporations, except those organized for religious, charitable, social, literary, educational, municipal or political purposes. These may all be in one sense, moneyed or business corporations, for they must all have and use money and transact business, to some extent, in order to carry out their objects. But we do not call them moneyed corporations as we would a bank, nor do we call them business corporations, as we would a manufacturing or mining company or ex-

press company, because their chief and primary object is not to transact business or make gain. They necessarily transact business in order to accomplish other ends than the mere doing of business and making profit."

And, as stated in *Black on Bankruptcy, Sec. 142, p. 350*:

"Religious societies in the United States are almost invariably corporations, and although they may buy and hold real and personal property and perhaps sell some of it again, and though they may raise money for church purposes by fairs and entertainments, conduct parochial schools, and enter into business contracts with employed in their service, yet they are clearly not to be classed as business corporations, for the reasons above given. So the fact that a college may acquire and convey property necessary to the accomplishment of its object, and may charge fees for tuition or instruction, does not make it a business or trading corporation. And again, an incorporated club, of which the principal object is social intercourse, any business conducted by it being merely incidental, is not subject to proceedings in involuntary bankruptcy."

And thus it was held in the case of *In re Fulton Club*, 113 Fed. 997, 7 Am. B. R. 670, decided under the Act of 1898, that a social club whose principal object is social intercourse, was not subject to involuntary bankruptcy, since business conducted by it, such as selling cigars, etc., to members, was not for gain.

Hence, it is maintained that the petition in the case

at bar is faulty and subject to demurrer or petition to dismiss, for the reason just discussed.

SHOULD NOT THE MOTION TO DISMISS
HAVE BEEN SUSTAINED BECAUSE THE
CLAIM OF ONE OF THE PETITIONING CREDIT-
ORS IS NOT ALLEGED WITH THE SUFFICIENT
CONSISTENCY AND PARTICULARITY RE-
QUIRED IN PLEADING?

Keeping in mind, then, the general principles of pleading as discussed under the former head, it is maintained that the petition should have been dismissed:

1. Because the claim of Dryer, Bollam & Co., one of the petitioning creditors, was not set forth with the requisite clearness and particularity, and

2. Because the statement of the claim is in itself inconsistent.

The statement of the claim is set forth in the petition as follows:

“Dryer, Bollam & Co., a co-partnership, money due on open account from Equal Rights Company, Inc., a corporation, upon a stated account rendered July 2, 1914.”

In *In re Farthing*, 202 Fed. 557, 561, decided by District Judge Connor of the Eastern District of North Carolina, heretofore cited, the question as to the required particularity and clearness with which a petitioner's claim should be set forth is ably discussed. Says the court:

“The demurrer challenges the allegations of the petition in this respect, for that the ‘nature’ of the petitioners’ alleged debts is not set forth with sufficient par-

ticularity to enable the respondent to answer the same intelligently. It must be conceded that there is but little authority upon the question raised by the demurrer. The industry of counsel and my own investigation discover but few decided cases in which it is discussed. Resort must, therefore, be had to general principles of pleading and the 'reason of the thing.' In *re White* (D. C.) 135 Fed. 199, there was a demurrer to the petition, for that it failed to set out particularly the nature of the debt. Judge Holland said: 'Thus far the petitioners have followed the form prescribed by general order 37 (38) of the Supreme Court prescribing the forms in bankruptcy; but in stating their claims, while the amount is given, the nature of the claim is not set forth, and, in that, it is defective, which, however, can be amended so as to meet the requirements of the act.' "

And it was there held that a petitioning creditors' claim was not set forth with the particularity required and the pleading was therefore demurrable, although it is asserted that the statement of the claim there was even more definitely set forth than in the case at bar, and the court's especial attention is called to this case. As stated in that opinion, there are but few cases upon the subject.

See also *In re Hadley*, Fed. Case No. 5894.

In re White, 135 Fed. 199.

Black on Bankruptcy, Sec. 160, p. 396.

Loveland on Bankruptcy (4th Ed.), p. 414.

In addition to the lack of clearness and detail with which the claim is set forth, the statement itself is inconsistent. It is asserted that the money is due on *open*

account upon an account stated. It is inconceivable how money could be claimed under both of these allegations. For example, an open account is defined as:

“An account *not stated* or agreed upon between the parties.”

1 *American & English Encyclopedia of Law*, p. 435.

An account stated is defined as:

“An agreement between the parties who have had previous transactions of a monetary character; that all the items of accounts representing such transactions are true, and that the balance struck is correct, together with a promise expressed or implied for the payment of said balance.”

1 *American & English Encyclopedia of Law*, p. 437.

Essentially the same definition is given in *Abbott's Law Dictionary* and *Black's Law Dictionary*, and in *Words and Phrases*.

In the case of *McCammant v. Bastel*, 59 *Tex.* 363, 369, it is stated that the term “stated account” is used in opposition to “open account;” and so in *Taylor v. Parker*, 17 *Minn.* 447, 451, it is stated that an account is open and current when it is running, *not closed, settled or stated*.

An interesting case along this line is that of *Holmes v. Page*, 19 *Ore.* 232, where an “account stated” is defined. There a wife was sued upon an account stated which arose out of purchases made by the wife for family necessities. The account was presented to the husband, who assented to the same, and it was attempted to show

that the husband (being bound for the family necessities of the wife under the Oregon law), was properly her agent to assent to the account, but the court held that the items of the account were not proper to be shown in the action on an account stated. That the action for the stated account was a new and different action, based on a different promise than the action upon open account, and that therefore the wife was not bound since he was not her agent to assent to the same. It is there stated:

“It is not disputed that if the goods were bought for family expenses and were used by the family but that the defendant is liable, but she cannot be made liable on a contract based on an account stated between her husband and the plaintiff to which she has not assented.”

It is too fundamental to cite or quote further cases or authorities in substantiation of the fact that there is a fundamental contrast between an open account and a stated account, and that an action on one precludes an action upon the other.

Reverting again to the case of *In re Farthing*, 202 *Fed.* 557, 562, it is there said:

“In the absence of more direct authority, it may aid us in arriving at a correct conclusion of the question raised by the demurrer to recur to the general rules of pleading. It would seem reasonable and just to apply to the petition in this respect the test by which the sufficiency of a declaration or complaint is measured in an action upon a negotiable instrument (the petitioner’s claim which was held demurrable here was upon a promissory note).

The rule uniformly applied is that material facts should be distinctly, and not inferentially alleged. The court will not supply, by intendment, an averment which the pleader has failed to make. The facts constituting the cause of action should be set forth in the complaint with definiteness and certainty. The plaintiff, in his complaint, should apprise the defendant of the precise grounds upon which he relies."

From which the deduction is clearly to be made that any statement as to a petitioner's claim in a petition in bankruptcy, which would be demurrable in a complaint or bill in an action or suit for its recovery, would be demurrable in a petition in bankruptcy, and it is urgently insisted that the allegation of this petitioner's claim is so inconsistent in itself as to be subject to demurrer.

For the reasons, therefore, that the claim is not set forth with that degree of particularity required in pleading, and that as set forth it is inconsistent, the petition to dismiss the third amended petition should have been sustained.

SHOULD NOT THE MOTION TO DISMISS
HAVE BEEN SUSTAINED BECAUSE THE VERI-
FICATION TO THE THIRD AMENDED PETI-
TION WAS MERELY UPON BELIEF AND NOT
UPON KNOWLEDGE?

The last point to be raised is that the petition was not properly verified. It will be remembered that the petitioners verified the petition upon belief and not upon knowledge. It is uniformly held by the Federal courts that the general orders, rules and forms promulgated by

the Supreme Court in accordance with section 30 of the Act, are binding upon courts of bankruptcy.

In re Scott, 99 *Fed.* 404; 3 *Am. B. R.* 625.

In re Gerber (C. C. A. 9th Cir.), 26 *Am. B. R.* 608, 617.

• *Collier on Bankruptcy*, p. 572.

Form No. 1 and Form No. 2 of the Official Forms, promulgated by the Supreme Court, prescribe a verification according to knowledge, information and belief. Official Form No. 3, promulgated by the Supreme Court, provides an absolute verification by the petitioning creditors to the effect that "the statements contained in the foregoing petition subscribed by them are true." The variance between the verification required by No. 1 and No. 2, and the verification required by Form No. 3, is significant, and the reason seems to be apparent. Form No. 1 and Form No. 2 are forms of voluntary petitions upon which an adjudication is immediately made, and to which no opposition or answer is permitted. Form No. 3 is a pleading upon which contests are permitted and are usual, and are, as to the alleged bankrupt at least, of grave import. Irreparable damages can result therefrom if involuntary petitions are improperly brought, or if brought upon rumor or belief, and the requirement as set forth in the verification of Form No. 3, that the verification should be absolute, is a requirement, the wisdom of which can readily be understood. This question is also discussed in *In re Farthing*, 202 *Fed.* 557, 566, already much quoted, and it was there held that the verification upon knowledge, information and belief was improper, and that the verification should follow the form prescribed under Form No. 3. Therefore, it

is contended on this ground also that the petition to dismiss should have been sustained.

In conclusion, then, it is earnestly asserted that the third amended petition filed in the case at bar, containing the many defects which it is asserted this petition contained, and filed under the circumstances under which it was filed, was subject to demurrer, and that the petition to dismiss the same should have been sustained, and particular stress is laid upon the fact that if any one of the objections raised herein, having been properly raised in the lower court, were valid objections, then the order of the District Court denying the petition to dismiss should be revised.

While it does not appear in the record of this case, it is not believed improper to state that this is the second involuntary action filed against this corporation. The first petition was amended three times, and finally dismissed without leave to amend, and the same petitioning creditors therein instituted immediately this second proceeding, in which there have been four petitions filed, the three amended ones and the original, and under such circumstances it is respectfully urged that the petition to dismiss should have been sustained by the District Court.

Respectfully submitted,

SIDNEY TEISER,

Attorney for Petitioner.

United States
Circuit Court of Appeals

For the Ninth Circuit

R. L. SABIN,

Petitioner,

vs.

BLAKE, McFALL Co., a Corporation,
KNIGHT PACKING Co., a Corporation,
HAZELWOOD Co., a Corporation, and
WM. H. DRYER AND W. W. BOLLAM,
Partners Trading as DRYER, BOLLAM & Co.,
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In the Matter of Equal Rights Company, Inc.,
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Brief of Respondents

Petition for Revision of a certain order of the
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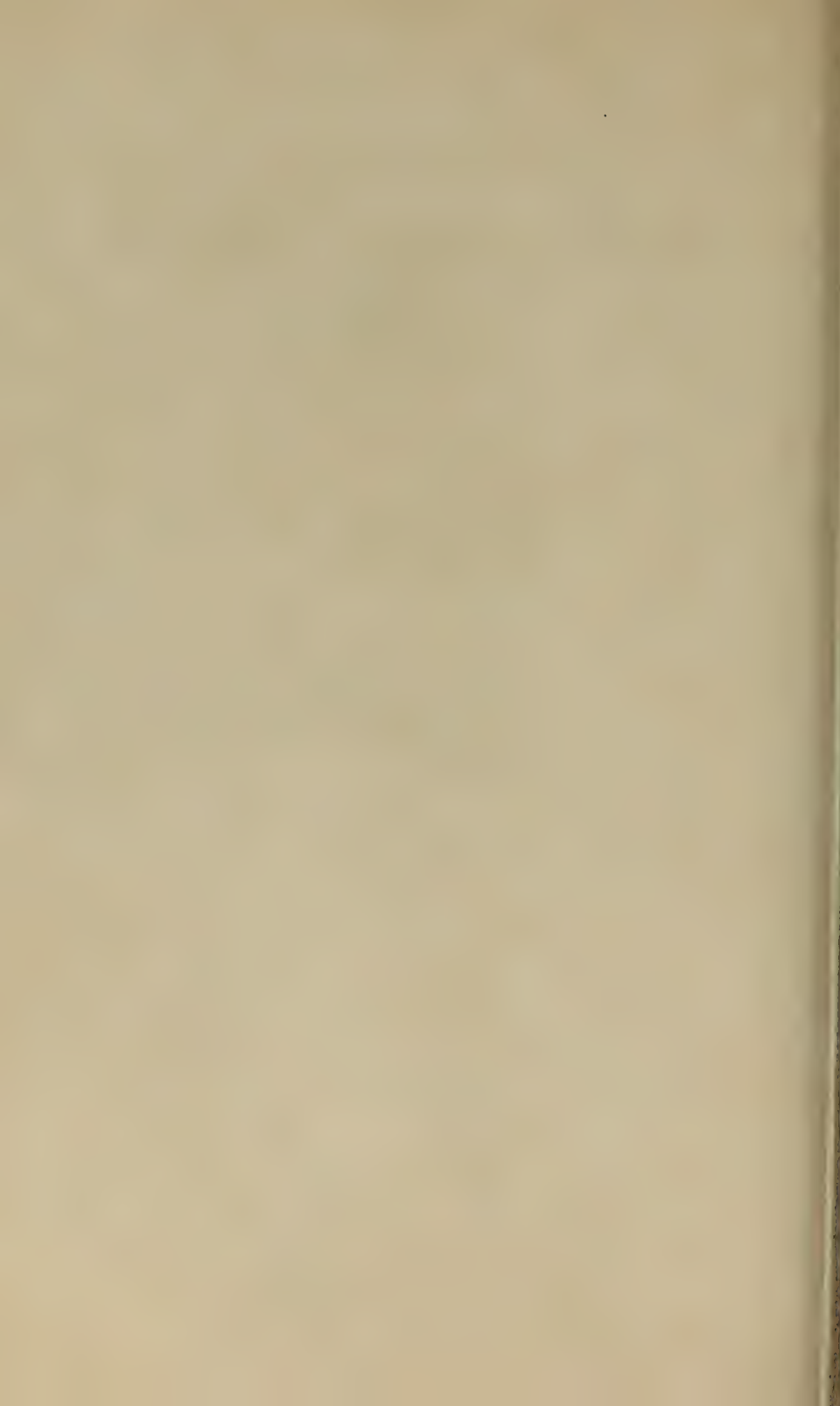
SIDNEY TEISER, Attorney for Petitioner.

SEITZ & CLARK AND BARGE E. LEONARD,
Attorneys for Respondents.

Filed

FEB 8 - 1915

F. D. Monckton,



No. 2541

United States
Circuit Court of Appeals
For the Ninth Circuit

R. L. SABIN,

Petitioner,

vs.

BLAKE, McFALL Co., a Corporation,
KNIGHT PACKING Co., a Corporation,
HAZELWOOD Co., a Corporation, and
WM. H. DRYER AND W. W. BOLLAM,
Partners Trading as DRYER, BOLLAM & Co.,
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In the Matter of Equal Rights Company, Inc.,
Alleged Bankrupt.

Brief of Respondents

Petition for Revision of a certain order of the
United States District Court for the District
of Oregon.

STATEMENT OF FACT.

The Equal Rights Grocery Company, Inc., conducted a small retail grocery store in St. Johns, Multnomah County, Oregon. Becoming financially involved and to prevent this petitioner from securing a preference on claims assigned to him and on

which action has been commenced, the petitioning creditors filed their petitions in bankruptcy, each under the strict ruling of the court being dismissed on motions made by this petitioner, similar to the one before the court. Thereafter an amended petition was filed which the alleged bankrupts answered, as shown on page 8, Abstract of Record. Said amended petition was dismissed November 16, 1914. Thereafter and by leave of court first had and obtained a second amended petition shown on page 14 of Abstract of Record was made and served upon the attorneys for the alleged bankrupt and this petitioner, on the 23rd day of November and filed the same day. The abstract shows this date to be November 25th. We believe this is due to some mistake. At most there was no appreciably delay and the petitioner has suffered no injury thereby.

Petitioner then filed his motion (page 22 and 23 Abstract of Record) to dismiss petition denominated as "Second Amended Petition." The court having heard counsel on said motion it was taken under advisement and by the decision of his Honor Judge Robert S. Bean, it was on December 24, ordered that said motion be denied, copy of which order is set forth, page 25, Abstract of Record. This order petitioner asks be revised in matters of law as shown in motion to dismiss, for reasons therein stated, which counsel for petitioner has arranged numerically on pages 4 and 5 of his brief which objections we will consider separately under the following

POINTS AND AUTHORITIES.

Objection Number I.

Paragraph VI, Page 26, Abstract of Record.

“That the said amended petition was not filed within the time allowed by the order permitting the amendment.”

This is a question within the sound discretion of the court, and the court being fully advised in the premises exercised its discretionary powers clearly within the statute in receiving respondents' petition and acting thereon.

In re R. L. Radke Co., 27 American Bankruptcy Reports 950, after stating facts very similar to the question in issue, the court said, at page 953:

“My attention has not been called to any rule which requires the amended petition to be stricken from the files for such a default.”

In the case of *Blackstone v. Everybodys Store*, 30 American Bankruptcy Reports, 497, from which we quote on page 501, relative to the discretionary power exercised by the court:

“The statute expressly clothes the court with power to grant more time than the statutory five days. An application for an extension of time in a situation like this calls for the exercise of discretion, an extension being granted by the court in the first instance in each of the proceedings it must be accepted as a step taken in the field of discretion and one not to be disturbed except on the grounds of clear error involving injustice.”

Objection Number II.

Paragraph III, Page 22, Abstract of Record.

“That said petition does not show that the alleged bankrupt is amenable to the provisions of the bankruptcy act.”

The respondent's allegations (shown on pages 14, 15, 16 and 17 Abstract of Record) are sufficient to render the alleged bankrupt amenable to Sections 4-a-b of the bankruptcy act as amended.

In section 4-B of the bankruptcy law of 1898, as amended in 1903 and 1910, any person except wage earners, tillers of the soil, municipal, railroads, insurance or banking corporations, owing debts to the amount of \$1000.00 or upwards may be adjudged involuntary bankrupts, the amendment of 1903 states *“engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits.”* We wish to note the amendment of 1910 while a superimposed statement of 1903 does not state that it need be *principally engaged* as in 1903 stated, but does define that *“any moneyed business or commercial corporation, except a municipal railroad, insurance or banking corporation owing debts to the amount of \$1000.00 or over may be adjudged an involuntary bankrupt.”*

Were we required to allege the bankrupt was *engaged principally* in a mercantile business, as to the statement of *engaged principally*, we have for the purpose of this motion, which has taken the place of a demurrer especially pleaded, shown (a)

that it is a corporation, (b) within the court's jurisdiction, and (c) has for six months next prior to the filing of the petition, had its principal place of business in the City of St. Johns, County of Multnomah and State of Oregon, and (d) as such a corporation was engaged in the *general retail merchandise business*.

Par. II of second amended petition as shown on page 15, Abstract of Record, shows that the alleged bankrupt is not within the excepted classes as mentioned by 4-B of the bankruptcy act of 1910, where the following named, wage earners, tillers of the soil, municipal railroads, insurance or banking corporations are enumerated, as not being amenable to the bankruptcy law as amended.

It is contended by counsel for petitioner that the rules of pleading govern. If this be true the statement that the alleged bankrupt was principally engaged in merchandise pursuits would be pleading a conclusion.

Whether a corporation is or is not principally engaged in manufacturing *is not a question of law but of fact* and must be shown by a preponderance of the evidence that the alleged bankrupt could be termed manufacturing, trading or mercantile.

T. E. Hill & Co. v. Contractors' Supply & Equipment Co., 24 Am. Bank. Rep. 84.

Walker Roofing, Etc. Co. v. Merchant & Evans, 23 Am. Bank. Rep. 185.

In 95 Fed. 271 in re San Gabriel Sanitarium. In the opinion given by Judge Wellborn he states that the Bankruptcy Act of March 2, 1867, the following words are construed in light of the Bankruptcy Law to mean. The word *mercantile* is defined thus at page 273:

“Pertaining to merchandise or the business of merchants. (Webster’s Dictionary), A merchant is one whose business it is to buy and sell merchandise and “merchandise is a term including all of the things which merchants sell, either retail or wholesale, as dry goods, hardware, groceries and drugs (Bouviers Law Dictionary).”

Objection Number III.

Paragraph IV, Page 23, Abstract of Record.

“That the nature of the claim of Dryer, Bolam & Co., one of the petitioning creditors therein, is not properly or fully set forth, and that without the claim of the said petitioning creditor, the jurisdictional amount required to be held by the petitioning creditors by the Bankruptcy Act, as amended, viz., \$500.00, would not be held by said petitioning creditors.

That money due upon a stated account is a provable claim.

“Section 57-A of the Bankruptcy Act provides that Proof of Claim shall consist of a statement under oath in writing signed by a creditor setting forth the claim, the consideration therefor and whether any, and, if so, what securities are held therefor and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.”

On page 20, Abstract of Record, is found the oath of W. H. Dryer, a member of the firm of Dryer, Bollam & Co.; that the statement of facts contained in said petition are true. The claim referred to is that of Dryer, Bollam & Co., a copartnership listed on page 16, Abstract of Record, the nature of said claim being money due upon a stated account rendered July 2, 1914, the consideration for said stated account was money due upon an open account from the alleged bankrupts, Equal Rights Company, as stated. The other requirements of Section 57-A are answered in the negative as to the preference, priorities and securities held in paragraphs III and IV, second amended petition shown on page 15, Abstract of Record.

Black on Bankruptcy, Sec. 160, as shown on page 396, states:

“As to the degree of particularity required in describing the claim, it is held that they should be so fully expressed in the petition that the court may see on the face of it that they are provable claims, but the provision of the 57th section of the act ‘requiring the consideration of a claim to be set forth and sworn to relates to the proof of the claim, and not to the averments of the petition.’ ”

In re Brett, 130 Fed. 981; 12 Amer. Bank. Rep 492.

The fact that it is shown by the petition that the said claim is an account stated as shown on page 16 Abstract of Record. The creditors' amended petition is sufficiently supported, and it is not neces-

sary to give evidence of the original debt on the several items constituting the account.

Field v. Knapp, 108 N. Y. 87.

Coffee v. Williams, 16 N. Y. Hun. 106.

Truman v. Owens, 17 Ore. 523; 21 Pac. 665.

Daytona Bridge Co. v. Frank Bond, et al, 47 Fla. Page 136.

From which we quote, page 143, Judge Shackelford said:

“While an account stated must be based upon previous dealings and transactions between the parties and while it is not necessary to support an action upon an account stated to show the nature of the original debt, or to prove the specific items constituting the account, it must appear that at the time of the accounting there had been previous transactions and dealings between the parties of and concerning which an account was stated.”

2 Chitty on Contracts, pages 961-962.

The Abstract of Record, at page 9, paragraph III, of the answer of the alleged bankrupt, admits the claims as set forth by the petitioning creditors and includes the claim of Dryer, Bollam & Co., a copartnership; that thereafter a stipulation was made as to said answer of the alleged bankrupts, which stipulation is shown on page 21, Abstract of Record, that the said answer referred to on page 9, of the Abstract of Record is to be considered an answer to the creditors' Second Amended Petition, and had the account of Dryer, Bollam & Co. not be-

come a stated account on July 2, 1914, the admission of the bankrupts in their answer filed herein on October 26th, 1914, is sufficient to render it an account stated as petitioner's motion to dismiss was filed December 4, 1914, subsequent to the stipulation filed November 25, 1914.

In the case of *Crawford v. Hutchinson*, reported in 38 Oregon, on page 580, Mr. Chief Justice Bean, after stating the facts, delivered the opinion from which we quote, on page 581:

"It is clear therefore that by reason of the silent acquiescence of the defendant the account rendered by the plaintiff to them became an account stated, which can only be opened for fraud, error or mistake. * * * (Page 582). The rule upon this point seems to be that, where the correctness of the account presented is admitted, either expressly or by failure to object within a reasonable time, it will amount to an account stated as to everything included therein, although the person acknowledging its accuracy may have an offset thereto, arising out of some independent transaction."

In the case of *Fitzgerald v. First National Bank*, 114 Fed. Rep. 474, from which we quote at page 481:

"And in the absence of fraud, mistake or undue advantage an account stated is conclusive, and estops the party which presents it from assailing its correctness."

Petillo v. Allan West Mission Co., 131 Fed. Rep. 680.

Atkinson v. Allen, 71 Fed. Rep. 58.

And, in our opinion, it should be at least as conclusive to an objecting creditor.

Objection Number IV.

As shown at paragraph V, on page 23, Abstract of Record.

“That said amended petition is not verified according to law and the requirements of the Bankruptcy Act, 1898, as amended.”

The defect of verification is not fatal to the petition, and is not jurisdictional, and should not warrant a dismissal of the petition.

In re Farthing, Vol. 29, Am. B. R. page 732, from which case we quote from page 744, after discussing the different forms prescribed by the Supreme Court, the court said with reference to verification:

“While I am of the opinion that the verification does not comply with the official form, it is well settled that the defect is not fatal to the petition and it is not jurisdictional, and should not, because of infirmity, warrant a dismissal of the petition.”

Green River Dep. Bank v. Craig, 6 Am. Bk. Rep. 110 Fed. 137.

Section 18-C of the Bankruptcy Act, as amended provides:

“All pleadings setting up matters of fact shall be verified under oath.”

It is our contention that the verification is sufficient (if it was not sufficient the petitioner should

move for a rule to require a proper verification, and if such rule is not complied with, to move to dismiss the petition for that reason.

Green River Dep. Bank v. Craig, 6 Am. Bk. Rep. 381.

Each of the petitioning creditors signing said petition have stated under oath that the statement of facts contained in the petition is true, and as is added, "As I verily believe" is not a qualification on the part of affiant. It is our contention that the statement "as I verily believe" is merely surplusage and does not render the statement less authentic, more than had affiant said "So help me God," or any other phrase expressive of his sincerity.

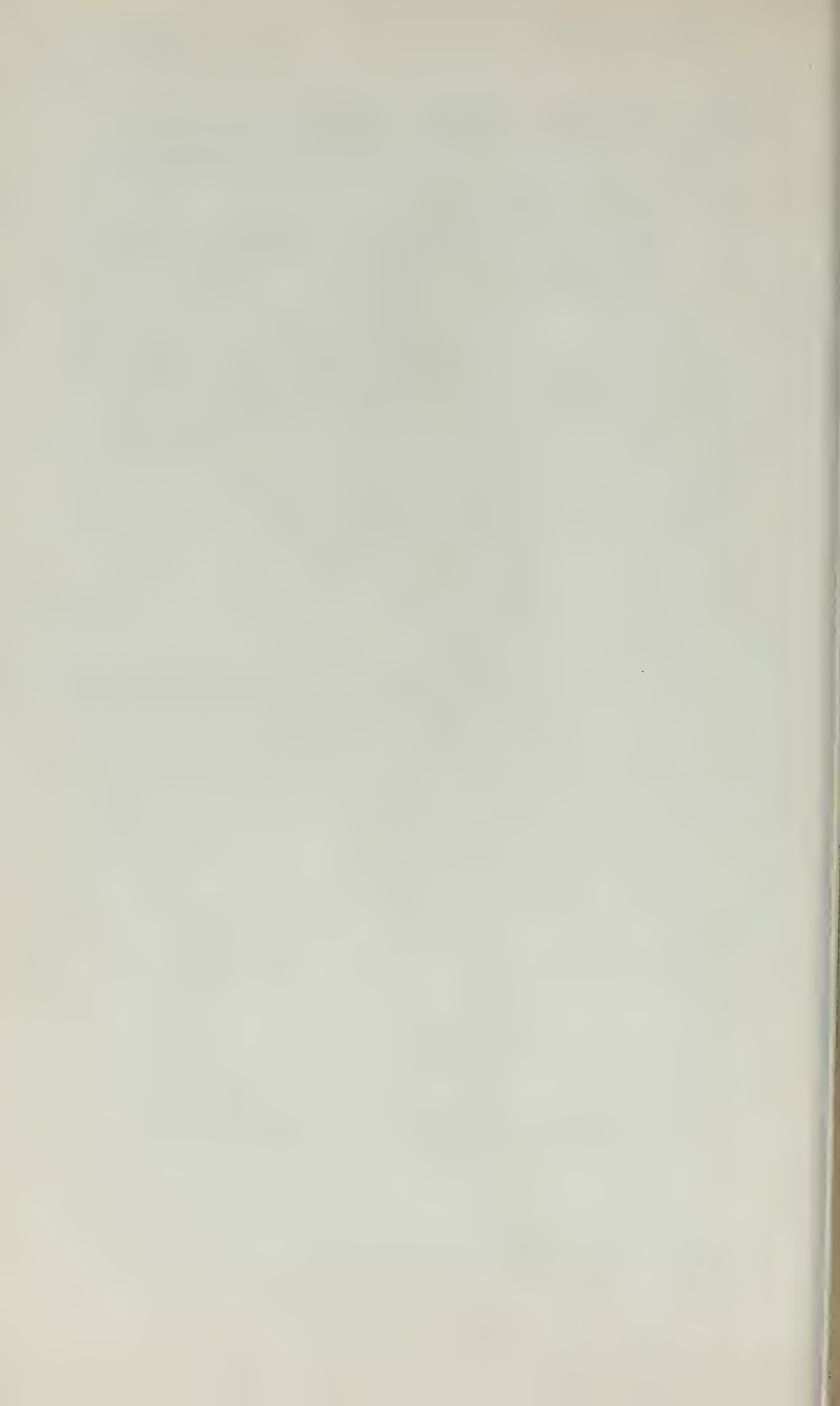
In conclusion we submit that the Respondent's Petition has stated facts sufficient to support the decision of the District Court; that the alleged bankrupt by its answer admits all of the material allegations contained in the petition; that the objections of the petitioner are technical and pertain to form only and do not go the merits of the cause; that the decision of the District Court herein should be affirmed.

Respectfully submitted,

SEITZ & CLARK,

MANNING, SLATER & LEONARD,

Attorneys for Petitioners.



IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

R. L. Sabin,

Petitioner,

vs.

Blake, McFall Company, a corporation, Knight
Packing Company, a corporation, Hazelwood
Company, a corporation, and William H.
Dryer and W. W. Bollam, partners trading as
Dryer, Bollam & Company,

Respondents,

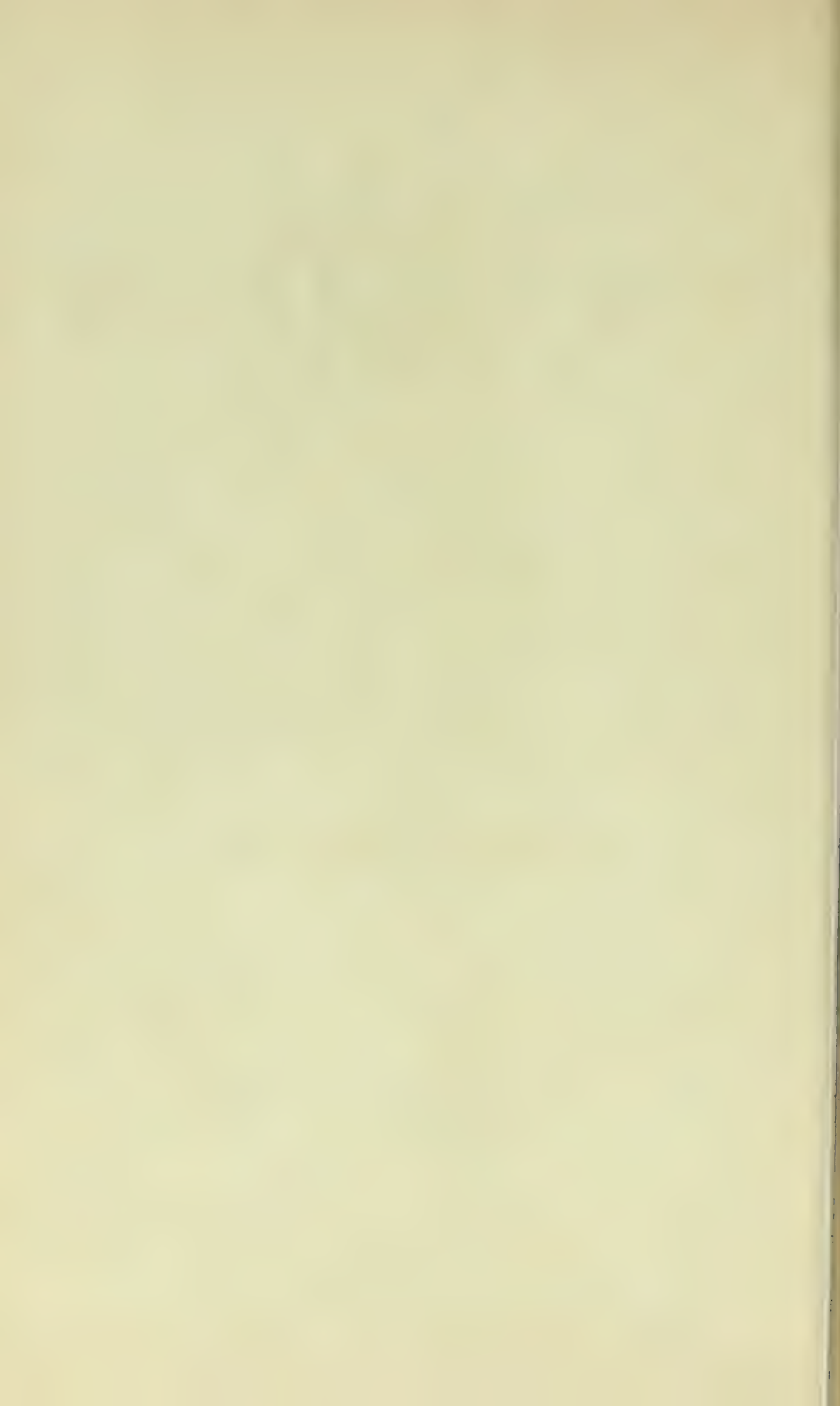
In the matter of
Equal Rights Company, Inc.
Alleged Bankrupt.

Petition for Rehearing
and
Motion

For an Order Vacating Order of this Court of May 24, 1915, and
for an Order Dismissing Petition Denominated "Creditors'
Second Amended Petition," as Verified by Amended
Verification Dated May 20, 1915; and for Costs
as Directed in the Opinion of this Court
Filed May 10, 1915.

Filed

JUN 1 6 1915



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Blake, McFall Company, a corporation, Knight
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Second Amended Petition," as Verified by Amended
Verification Dated May 20, 1915; and for Costs
as Directed in the Opinion of this Court
Filed May 10, 1915.

Comes now R. L. Sabin, petitioner herein, and respectfully represents, petitions and moves the court as follows:

That on the 10th day of May, 1915, this Honorable

Court handed down an opinion in the above entitled cause, wherein it held, amongst other matters, that the verification to the petition filed in the lower Court was defective because the petitioners did not verify it upon knowledge, as prescribed by the forms promulgated by the Supreme Court, and in which it further held that the defect not being jurisdictional the petitioning creditors, respondents herein, were permitted to file an amendment upon terms, the court, in concluding said opinion saying:

“The order will therefore be, that the petitioning creditors have leave to verify the petition in accordance with the prescribed form within ten days after notice of this order. If not so verified the order of the lower Court will be reversed and the creditors’ petition dismissed. Costs on this petition in favor of petitioner.”

And accordingly, an order was duly entered by this Honorable Court on said 10th day of May, 1915.

Your petitioner further represents that the petitioning creditors, respondents herein, were notified of said order by the clerk of this Court by letter dated May 10, 1915, which the attorneys for said respondents received not later than May 14, 1915.

That on the 21st day of May, 1915, your petitioner had served upon him an amended verification to the petition denominated “Creditors’ Second Amended Petition” in this cause, in attempted compliance with the order of this Court entered on said 10th day of May, 1915,

the original of which, it is assumed has been filed with this Honorable Court.

That more than ten days have elapsed since respondents had notice of the order of this Court entered May 10, 1915, in this cause, and no further or other verification has been made except the amended verification dated May 20, 1915, and served upon your petitioner on May 21, 1915.

That on the 24th day of May, 1915, an order was entered *ex parte* by this Honorable Court affirming the order of the lower Court reviewed in the above entitled matter with costs in favor of respondents and against the petitioner.

Your petitioner respectfully represents that said order of May 24th, 1915, is erroneous and should be vacated; first, because it was made without an opportunity on the part of your petitioner to object to the verification filed in attempted compliance with the order of this Court of May 10th, 1915, said verification in fact not being in compliance with the order of this Court of May 10, 1915; and, secondly, because the order itself is at variance and inconsistent with the opinion filed by this Court May 10, 1915, and the order of May 10th, 1915, made pursuant thereto in this cause, in that said order of May 24th, 1915, allows costs against the petitioner, whereas said opinion filed May 10, 1915, and the order made pursuant thereto, directs the awarding and awards costs in favor of the petitioner and in that said order of May 24, 1915, affirms the order of the lower Court whereas the opinion filed May 10th, 1915, and the order pursuant thereto in effect reverses the order of the lower Court since one of the contentions of the petitioner in the lower Court and in this Court upon review was that the

verification was not proper and sufficient, and this Honorable Court in its opinion so held, whereas the lower Court held otherwise.

Your petitioner further shows that the amended verifications to said petition are faulty and defective and therefore are not in compliance with the order of this Court entered May 10th, 1915, in that the verification of Blake, McFall Company, of Knight Packing Company and of Hazelwood Company, does not set out that the officers making the same had authority to sign or verify the petition in bankruptcy, and no such allegation is made in the petition.

Your petitioner further shows in respect to said verification that in the lower Court the Second Amended Petition (not the petition denominated "Second Amended Petition" in the records before this Court upon motion to dismiss, was held faulty because the verification did not show that the officers executing the same (being the same officers, with one exception, who executed the amended verification filed herein) had authority to sign and verify the petition in bankruptcy. Your petitioner further states that the lower Court handed down no written opinion in the matter, but in substantiation of this fact your petitioner respectfully refers the Court to verification of the creditors' petition, denominated "Creditors' Second Amended Petition" set forth in the transcript of record herein, pages 18 to 20, in which all of the verifications set forth that the parties making the same were duly authorized to sign the petition, while no such allegation was made in the verification to the Creditors' Second Amended Petition to which a motion to dismiss was allowed in the lower Court with power to

amend, and which was accordingly amended as set forth in the Transcript of Record, pages 18 to 20.

Your petitioner, as authority for said assertion that the amended verifications filed in attempted compliance with the order of May 10th, 1915, by this Court, are faulty and defective, respectfully refers this Honorable Court to the following cases:

In re: McNaughton, 8 Natl. Bankruptcy Rep. 44, Fed. Case No. 8912, Vol. 16, page 323.

In re: Roche v. Fox, 16 Natl. Bankruptcy Rep. 461, Fed. Case No. 11,974, Vol. 20, page 1065.

In re: Bellah, 116 Fed. 69, 76.

Black on Bankruptcy (1914), Sec. 162, page 406.

Remington on Bankruptcy (2d Ed.), Sec. 279, Vol. 1, page 255.

In the case In re: McNaughton, 8 Natl. Bankruptcy Rep. 44, Fed. Case No. 8912, Vol. 16, page 323, it is said, upon a similar objection to the one here made:

“I do not think any officer of a corporation has authority, by virtue of his office, to sign and verify a petition for adjudication of bankruptcy against a debtor of the corporation, unless specially authorized by some statute, by law or resolution of its board of directors. Such authority, being special, must in all cases be made to appear by the oath of the person signing and verifying the petition, or other com-

petent evidence. This was not done in this case, and if the respondent had stood upon his motion to dismiss, I should have come to the conclusion that the motion should be granted, so far, at least, as to vacate the order to show cause."

And so, in *In re: Bellah*, 116 Fed. 69, 76, sustaining a similar objection, it is said:

"This objection is, in my opinion, well taken. A corporation can act only through its officers or agents; and where its name is subscribed by an individual to a petition and the petition purports to be verified by the same person it is necessary that such person should set forth under oath or affirmation that he was authorized to sign and verify the petition on behalf of the corporation. The omission of such an averment unless remedied is fatal."

And so it is said by Black, in his work on Bankruptcy, Section 162, page 406:

"And in the case of a corporation, its name may be signed and the petition verified for it by its attorney, by an agent, or by one of its officers duly authorized to act for it in this particular. But this authority must be special. Neither the president nor any officer of a corporation has author-

ity, by virtue of his office, to sign and verify a petition for adjudication of bankruptcy against a debtor of the corporation, unless specially authorized by some statute, by-law, or resolution of its board of directors. Such authority, being special, must in all cases be made to appear by the oath of the person signing and verifying the petition or other competent evidence.' ”

Your petitioner further represents that the amended verification of Blake, McFall Company is particularly defective in that such special authority is not shown since the petition was signed in the name of Blake, McFall Company, by its Secretary, (See Record, page 18), while the amended verification is made by the President.

WHEREFORE, your petitioner prays:

First: That the order of May 24, 1915, be vacated, and that an order be entered by this Court dismissing the petition, without power to amend, since the amended verification filed in this Court is faulty and therefore not in compliance with the order of this Court of May 10, 1915; and

Second: That costs be awarded to petitioner as directed in the opinion of said Court filed May 10, 1915.

R. L. SABIN,

Petitioner.

United States of America,)
Dist. and State of Oregon,) ss.
County of Multnomah,)

I, R. L. Sabin, being first duly sworn, depose and say

that I am the Petitioner in the above proceeding, whose name is signed to the foregoing Motion, and that all the facts contained therein are true as I verily believe, and that the foregoing is not interposed for delay.

R. L. SABIN.

Subscribed and sworn to before me this 27th day of May, 1915.

SIDNEY TEISER,

Notary Public for Oregon.

My commission expires August 8, 1916.

United States of America,)
Dist. and State of Oregon,) ss.
County of Multnomah,)

I hereby certify that the foregoing Motion is, in my opinion, well founded in point of law, and is not interposed for delay.

Dated at Portland, Oregon, this 27th day of May, 1915.

SIDNEY TEISER,

Attorney for R. L. Sabin,

~~Respondent~~

Petitioner

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAM YICK and JUNG KIM *Alias* JUNG CHUNG,
Plaintiffs in Error,
vs.

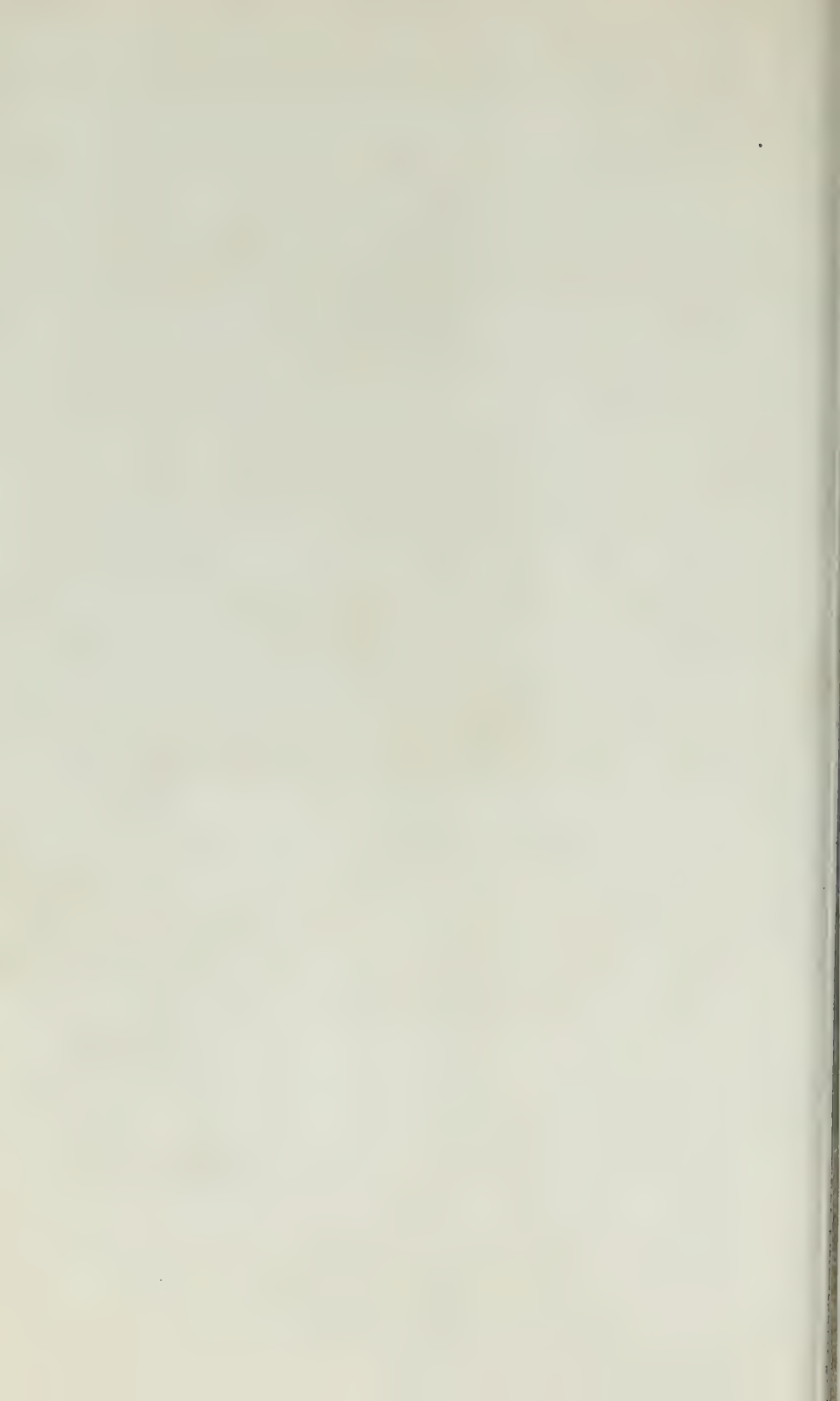
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

JAN 18 1915



United States
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For the Ninth Circuit.

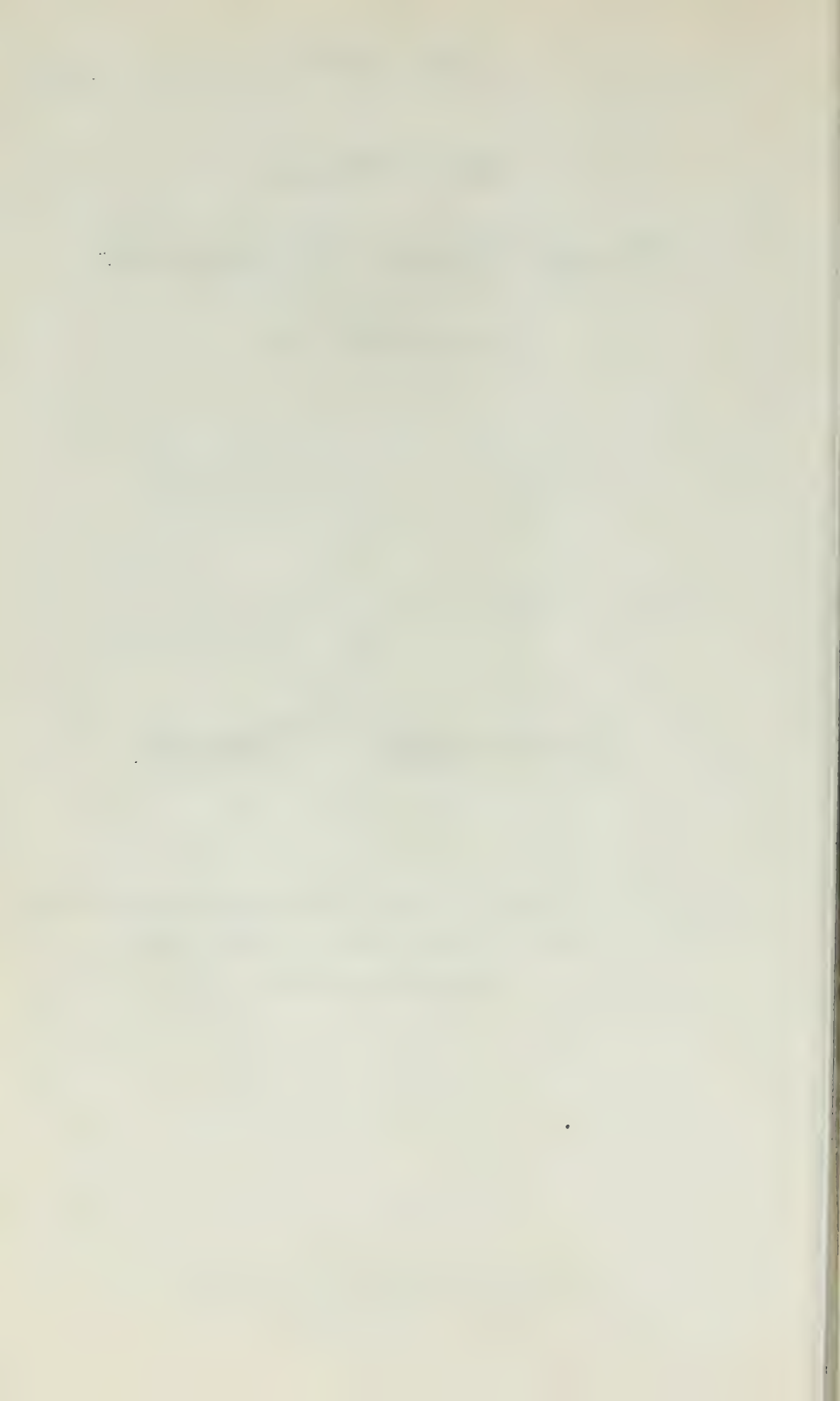
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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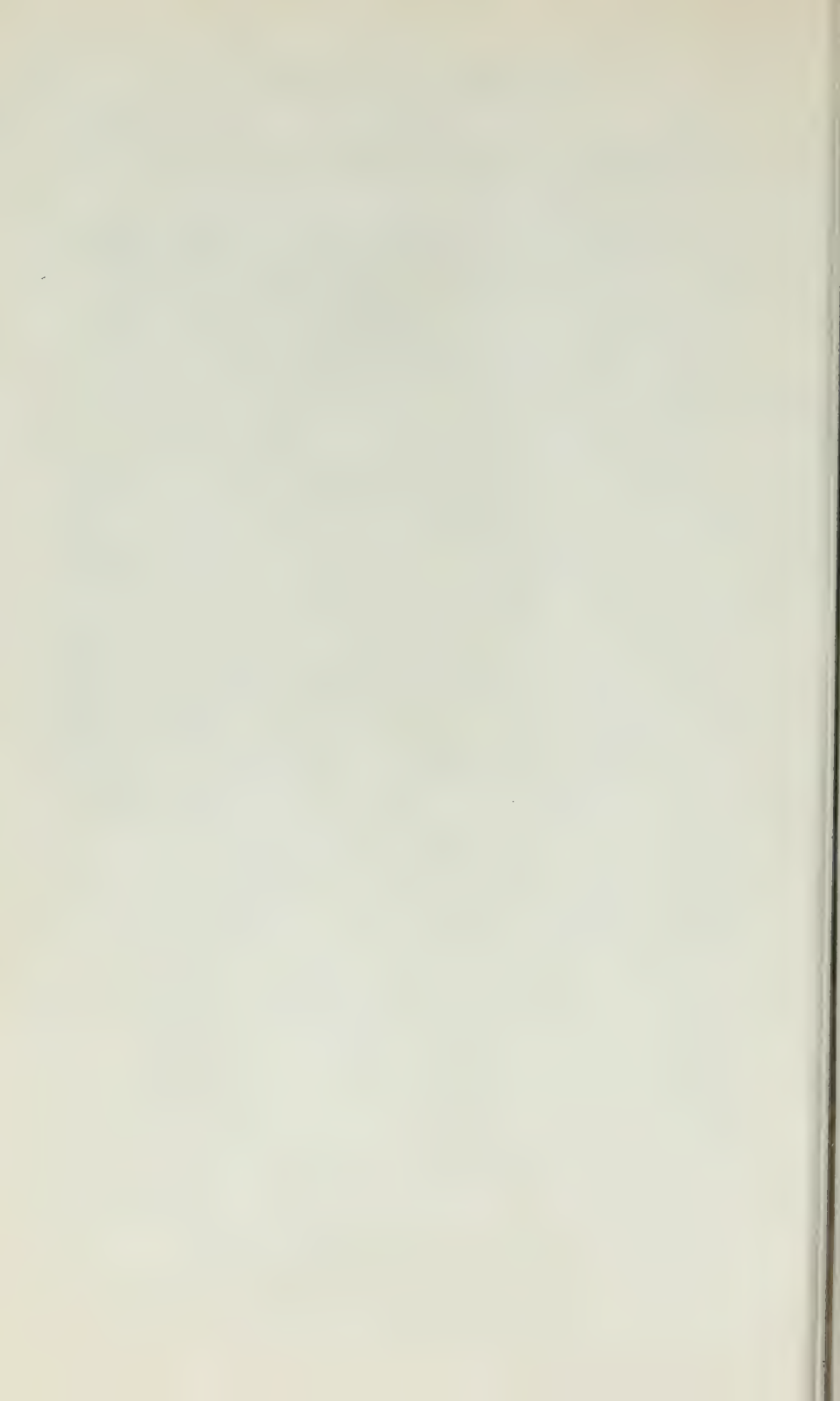
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Names and Addresses of Attorneys.

For Plaintiffs in Error:

Messrs. MOTT & DILLON, 426 Douglas Building, Los Angeles, California; and
ISADORE B. DOCKWEILER, Esq., 536 Douglas Building, Los Angeles, California.

For Defendants in Error:

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California;
DUKE STONE, Esq., Assistant U. S. Attorney, Los Angeles, California; and
ROBERT O'CONNOR, Esq., Assistant U. S. Attorney, Los Angeles. [5*]

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the United States District Court, in and for the Southern District of California, Southern Division: Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the United States of America, as plaintiff, and Sam Yick and Jung Kim, *alias* Jung Chung, as defendants, a manifest error hath happened, to the great damage of the said defendants, and each of them, as by their complaint appears. We, being willing that error, if any hath been, should be duly

*Page-number appearing at foot of page of original certified Record.

corrected, and full and speedy justice done to the parties aforesaid in this behalf, do hereby command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, on the 5th day of June, 1914, next in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 8th day of May, in the year of our Lord [6] One Thousand Nine Hundred and Fourteen, and of the Independence of the United States the One Hundred and Thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the United States District Court, in and for the Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk.

The above writ of error is hereby allowed.

OLIN WELLBORN,
District Judge.

I hereby certify that a copy of the within writ of error was on the 8th day of May, 1914, lodged in the Clerk's office of the said United States District Court for the Southern District of California, Southern Division, for the said defendants in error.

WM. M. VAN DYKE,

Clerk of the United States District Court, Southern District of California, Southern Division.

By Chas. N. Williams,

Deputy Clerk. [7]

[Endorsed]: No. 575—Criminal. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, plaintiff, vs. Sam Yick and Jung Kim, *alias* Jung Chung, defendants. Writ of Error. Filed May 8, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Service of the within Writ of Error is hereby admitted this 8th day of May, 1914.

ALBERT SCHOONOVER,

United States District Attorney. [8]

Citation [on Writ of Error (Original)].

UNITED STATES OF AMERICA,—ss.

To the United States of America, and to the United States District Attorney for the Southern District of California, Southern Division, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 5th day of June, A. D. 1914, pursuant to a

Writ of Error, filed in the Clerk's office of the United States District Court of the Southern District of California, Southern Division, in that certain action No. 575 Criminal, wherein Sam Yick and Jung Kim, *alias* Jung Chung, are plaintiffs in error, and you are the defendant in error, to show cause, if any there be, why the judgment and sentence given, made and rendered against the said plaintiffs in error, as in the said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, Southern Division, this 8th day of May, 1914, and of the Independence of the United States the One Hundred and Thirty-eighth.

OLIN WELLBORN,

United States District Judge.

Receipt of a copy of the within citation is hereby admitted, this 8th day of May, 1914.

ALBERT SCHOONOVER,

United States District Attorney for the Southern District of California.

By DUKE STONE,

Assistant District Attorney. [9]

[Endorsed]: No. 575—Criminal. In the United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff, vs. Sam Yick and Jung Kim, *alias* Jung Chung, Defendants. Citation. Filed May 8, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [10]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 575—CRIM.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM, *alias* JUNG CHUNG,
Defendants. [11]

[Indictment.]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

At a stated term of said Court, begun and holden at
the City of Los Angeles, County of Los Angeles,
within and for the Southern Division of the
Southern District of California, on the second
Monday of July, in the year of our Lord one
thousand nine hundred and twelve,—

The Grand Jurors of the United States of America,
chosen, selected and sworn, within and for the Divi-
sion and District aforesaid, on their oath present :

That Sam Yick and Jung Kim, *alias* Jang Chung,
whose full and true names, other than as herein
stated, are, and each of them is, to the Grand Jurors
unknown, heretofore, to wit, on the 24th day of
August, in the year of our Lord one thousand nine
hundred and eleven, at and within the County of
Kern, in the Southern District of California, and
within the jurisdiction of this Honorable Court, did

knowingly, wilfully, wickedly, unlawfully, corruptly and feloniously conspire, combine, confederate and agree together, and with divers other persons, whose names are to the said Grand Jurors unknown, to commit certain offenses against the United States, that is to say:

They, the said Sam Yick and Jung Kim, *alias* Jang Chung, did, at the time and place aforesaid, knowingly, wilfully, wickedly unlawfully, corruptly and feloniously conspire, combine, confederate and agree together and with said divers other persons, whose names are, as aforesaid, to the Grand Jurors unknown, to wilfully, unlawfully and knowingly bring into, and cause to brought into, and aid and abet the bringing into the United States of America, by land, at divers points and places in the Southern Division of the Southern District of California, said [12] points and places, except as herein stated, being to the Grand Jurors unknown, from divers points and places in the Republic of Mexico, to wit, from the town of Tia Juana in said Republic of Mexico, and from other points and places in said Republic of Mexico, the names of which said other points and places being to said Grand Jurors unknown, certain Chinese persons, to wit, Dock Yook, See Chew and Wah Sung, each being a Chinese person, and any and all other and additional Chinese persons who were then, and those who would thereafter be in said Republic of Mexico, desiring and intending to enter the United States, whose names are, and each of them is, other than as herein stated, to the Grand Jurors unknown, and which said Chinese persons, as they,

the said Sam Yick and Jung Kim *alias* Jang Chung, and said divers other persons, whose names are to the Grand Jurors unknown, then and there well knew, were not, nor was either or any of them, then and there, or at any time thereafter, or at all, entitled, permitted or allowed by the laws of the United States, to enter or remain in the United States, and each of which said Chinese persons, as they, the said Yam Yick and Jung Kim, *alias* Jang Chung, and the said divers other persons, then and there and at all times in this indictment mentioned and referred to, well knew, was then and there and at all times in this indictment mentioned and referred to, would be a Chinese laborer and native of China and a person of Chinese descent, and would not have and would not be entitled to have a certificate of residence entitling him to enter, be or remain in the United States.

That said conspiracy, confederation, combination and agreement between said Sam Yick and Jung Kim, *alias* [13] Jang Chung, and the said divers other persons whose names are, as aforesaid, to the Grand Jurors unknown, was continuously throughout all of the times from *from* and after said 24th day of August in the year of our Lord one thousand nine hundred and eleven, and at all of the times in this indictment mentioned and referred to, and particularly at the time of the commission of each and all of the overt acts in this indictment hereinafter set forth, in existence and process of execution.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Jung Kim, *alias* Jang Chung, did, on September 8, 1911, at the City of Bakersfield, in the County of Kern, State of California, purchase a certain railway ticket for his transportation from said City of Bakersfield to the City of San Diego, County of San Diego, State of California, and did, on said September 8, 1911, leave and depart from said City of Bakersfield over the line of the Southern Pacific Railway, and did travel from said City of Bakerseld to the said City of San Diego in the State of California.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in further execution of said conspiracy, combination, confederation and agreement, and to further effect and accomplish the object thereof, the said Jung Kim, *alias* Jang Chung, on the 13th day of September, 1911, did leave the city of San Diego, California, and go to the town of Tia Juana, Mexico, for the purpose of arranging to bring three certain Chinese persons, to wit, said Dock Yook, See Chew and Wah Sung, from said town of Tia [14] Juana, Mexico, into the United States, across the international boundary line between the United States and the Republic of Mexico, at a point on said boundary line near said Tia Juana, Mexico, the exact location of said point being to the Grand Jurors unknown, the said three Chinese persons, and each of them, as they, the said Sam Yick and Jung Kim, *alias* Jang Chung, and said divers other persons to

the Grand Jurors unknown, and each of them, then and there well knew, not being then and there or at any time in this indictment mentioned and referred to lawfully entitled to enter, be or remain in the United States, and each of said three Chinese persons, to wit, said Dock Yook, See Chew and Wah Sung, being then and there and at all times in this indictment mentioned and referred to, a Chinese laborer and a native of China and a person of Chinese descent, not having and not entitled to have a certificate of residence entitling him to enter, be or remain in the United States.

Contrary to the form of the Statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

A. I. McCORMICK,

United States Attorney.

HARRY R. ARCHBALD,

Assistant United States Attorney.

[Endorsed]: No. 575—Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. Sam Yick and Jung Kim, *alias* Jang Chung. Indictment for Violation Sec. 37, Act of March 4, 1909, Chap. 321. Conspiring to smuggle Chinese laborers into the United [15] States by land. A True Bill. H. G. Krohn, Foreman. Presented and filed in open court, this 2d day of January, A. D. 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. _____, United States Attorney. [16]

[Arraignment and Pleas of Defendants.]**COPY PLEA.**

At a stated term, to wit, the January Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Thursday, the 24th day of April, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM, *alias* JANG CHUNG,
Defendants.

This cause coming on this day by consent for the arraignments of defendants and for the entry of their pleas; Dudley W. Robinson, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on bail, with their counsel, John G. Mott, Esq., and Isidore B. Dockweiler, Esq.; and defendants having been severally called and arraigned, having stated that their true names are respectively Sam Yick and Jung Kim, and having waived the reading of the indictment, and, on being required to plead to said indictment, said defendants having each pleaded not guilty as charged

therein, said pleas are now, by order of the Court, hereby entered herein. [17]

[Minutes of Trial—March 24, 1914.]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the 24th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants.

This cause coming on this day to be tried before the Court and a jury to be impanelled; Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; and both sides having answered ready; and the Court having ordered that the trial proceed, and that a jury be impanelled herein; and John P. Doyle having been sworn as shorthand reporter of the testimony and proceedings, and acting as such; and the following

twelve (12) term trial jurors having been duly drawn, called, and sworn on *voir dire*, to wit: Andrew T. Gray, Arthur W. Ballard, George A. Ralphs, E. G. Russell, Louis Blankenhorn, John R. Grant, Harry P. Hubbard, Fred W. Marshall, G. W. Bartels, Edwin F. Hill, G. L. Davidson and Arthur E. Cummings; and a statement of the nature of the case having been made by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States; and said twelve jurors having been examined by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, and by [18] John G. Mott, Esq., of counsel for defendants, and passed for cause; and John R. Grant having been challenged peremptorily by the Government and excused; and F. M. Adams, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants and passed for cause; and Andrew T. Gray having been challenged peremptorily by defendants and excused; and Frank L. A. Violet, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants, and passed for cause; and B. W. Bartels having been challenged peremptorily by the Government and excused; and William Bayley, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants, and passed for cause; and Frank L. A. Violet having been challenged peremptorily by defendants, and excused; and Wm. D. Byram, a term trial juror,

having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants, and passed for cause; and William Bayley having been challenged peremptorily by the Government and excused; and John S. Winchester, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants, and said juror having thereupon been challenged for cause by defendants and excused by the Court; and G. L. Davidson having been challenged peremptorily by the defendants and excused; and Geo. W. Van Alstyne, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants, and passed for cause; and Louis Blankenhorn having been challenged peremptorily by the Government and excused; and Samuel Rees, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants, [19] and passed for cause; and Arthur W. Ballard having been challenged peremptorily by defendants and excused; and Robert C. P. Smith, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants, and passed for cause; and the twelve (12) jurors now in the box having been accepted by counsel for both sides and sworn in a body as the jury to try this cause, said jury as so impanelled and sworn consisting of the following named jurors, to wit:

JURY.

- | | |
|------------------------|--------------------------|
| 1. Wm. D. Byram, | 7. Harry P. Hubbard, |
| 2. Robert C. P. Smith, | 8. Fred W. Marshall. |
| 3. George A. Ralphs, | 9. Wm. E. Reavis, |
| 4. E. G. Russell, | 10. Edwin F. Hill, |
| 5. Samuel Rees, | 11. Geo. W. Van Alstyne, |
| 6. F. M. Adams, | 12. Arthur E. Cummings; |

said cause is thereupon, at the hour of 11:35 o'clock A. M., passed temporarily for further trial, to enable the Court to enter an order in a bankruptcy matter.

(At 11:38 A. M.)

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants.

This cause coming on now, at the hour of 11:38 o'clock, A. M., to be further tried before the Court and a jury heretofore duly impanelled herein, Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; John P. Doyle [20] being present as shorthand reporter of the testimony and proceedings and acting as such; and the jury all being present in court, not having left their seats; and the indictment having been read and defendants' pleas of not guilty having been stated to the jury by the Clerk; and

Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, having made a statement to the jury of what the Government expects to prove; and Edward P. Morse having been called and sworn as a witness on behalf of the United States, and having given his testimony; and the Court having, at the hour of 11:55 o'clock A. M., admonished the jury that, during the progress of this trial, they are not to permit other persons to talk to them nor themselves talk to other persons about this case or anything connected with this case, and that, until said case is finally given them for consideration, under the instructions of the Court, they are not to talk to each other about this case or anything connected therewith; and the Court having thereupon excused the jury until the hour of 2 o'clock P. M. of this day; and court, at the hour of 12:23 o'clock P. M., having taken a recess until the hour of 2 o'clock P. M., of this day;

And now, at the hour of 2 o'clock P. M., of this day, court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and Edward P. Morse, a witness on behalf of the United States, having resumed the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, the Government having offered the following exhibits, which are admitted in evidence in its behalf, to wit: U. S. Ex. 1, Letter of May 9, 1911, and envelope, addressed "*Eward P. Moorse*"; U. S. Ex. 2, Letter of August 4, 1911, and envelope, ad-

dressed "Edward P. *Moose*"; U. S. Ex. 3, four slips with Chinese characters [21] thereon; U. S. Ex. 4, Duplicate slips; U. S. Ex. 5, Receipt for three twenty dollar gold coins; and U. S. Ex. 6, three twenty dollar gold pieces; and the jury having been given the usual admonition by the Court; it is, at the hour of 3:55 o'clock P. M., ordered that this cause be, and the same hereby is continued until Wednesday, the 25th day of March, 1914, at 10:30 o'clock A. M., for further trial, until which time the jurors are excused. [22]

[Minutes of Trial—March 25, 1914.]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Wednesday, the 25th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants.

This cause coming on this day to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert

O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; and N. H. Peterson having been sworn as shorthand reporter of the testimony and proceedings, and said N. H. Peterson and John P. Doyle being present as shorthand reporters of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Edward P. Morse, a witness on behalf of the United States, having resumed the stand for further examination, and having given his testimony; and the Court having given the jury the usual admonition; it is ordered that this cause be, and the same hereby is continued until the hour of 2 o'clock P. M., of this day for further trial, until which time the jurors are excused. [23]

(At 2 P. M.)

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants.

This cause coming on at this time to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present in court, on their own recognizance,

with their counsel, John G. Mott, Esq., and I. B. Dockdeiler, Esq.; N. H. Peterson being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and the jury, at the hour of 2:01 o'clock P. M., having been excused from the courtroom temporarily during the argument of a point of law; and a certain point of law having been argued, on behalf of defendants, by I. B. Dockweiler, Esq., of counsel for defendants; and the jury, at the hour of 2:51 o'clock P. M., having been called into court; and the roll of the jury having been called, and all being present; and the Court having given the jury the usual admonition; it is, at the hour of 2:52 o'clock P. M., ordered that the jury be, and they hereby are excused until Thursday, the 26th day of March, 1914, at 10:30 o'clock A. M.; and a certain point of law having been argued, on behalf of the Government, by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States; and court, at the hour of 3 o'clock P. M., having taken a recess for 5 minutes; and now, at the hour of 3:05 o'clock P. M., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and a certain point of law [24] having been further argued on behalf of the Government, by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States; it is, at the hour of 3:25 o'clock P. M., ordered that this cause be, and the same hereby is continued until Thursday, the 26th day of March, 1914, at 10:30 o'clock A. M., for further trial. [25]

[Minutes of Trial—March 26, 1914.]

At a stated term, to wit, the January Term A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Thursday, the 26th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants.

This cause coming on this day to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; John P. Doyle and N. H. Peterson being present as shorthand reporters of the testimony and proceedings, and acting as such; and the roll of the jury having been called, in connection with the call of the roll of the entire panel of term trial jurors, and all being present; and Edward P. Morse, a witness on behalf of the United States, having resumed the

stand for further examination, and having given his testimony; and court, at the hour of 11:08 o'clock A. M., having taken a recess for 7 minutes; and now, at the hour of 11:15 o'clock A. M., court having reconvened; and defendants and counsel being present as before; N. H. Peterson being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Edward P. Morse, a witness on behalf [26] of the United States, being on the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, the Government having offered for identification a telegram to Gai Shee, which is for identification marked U. S. Exhibit 7; and Wm. E. Giddings, Mrs. Edna Giddings, W. J. Weems, R. R. Jackson, and A. G. Bernard having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and, in connection with the testimony of said last witness, the Government having offered a slip with the address of Mee Hong thereon, which is admitted in evidence as U. S. Ex. 8; and court, at the hour of 12:23 o'clock P. M., having taken a recess until the hour of 2 o'clock P. M., of this day.

And now, at the hour of 2 o'clock P. M., court having reconvened; and defendants and counsel being present as before; N. H. Peterson being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and A. G. Bernard, a witness on behalf of the United

States, having resumed the stand for further examination, and having given his testimony; and, in connection with the testimony of said witness, the government having offered two exhibits, which are admitted in evidence in its behalf, to wit: U. S. Ex. 9, a note; and U. S. Ex. 7 (heretofore offered and marked for identification), telegram to Gai Shee; and, also in connection with the testimony of said witness, the Government having offered for identification a Chinese letter and a translation thereof, which are together marked for identification U. S. Ex. 10; and, also in connection with said testimony, the defendants having offered a Memorandum Book, which is admitted in evidence in their behalf as "Defts.' Ex. A; and, by consent of counsel, the following witnesses having been called on behalf of defendant (out of regular order), to wit: [27] F. G. Munzer, Arthur Weaver, Charles E. Baer, Charles H. Sherbin, and F. G. Colton, who are respectively duly sworn and give their testimony on behalf of said defendants; and Adolph R. Neilson having been duly called and sworn as a witness on behalf of the United States, and having given his testimony; it is, at the hour of 4:22 o'clock P. M., ordered that this cause be, and the same hereby is continued for further trial until Friday, the 27th day of March, 1914, at 10:30 o'clock A. M., until which time the jurors are excused. [28]

[Minutes of Trial—March 27, 1914.]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the 27th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,
vs.
SAM YICK and JUNG KIM,
Defendants.

This cause coming on this day to be further tried before the court and a jury heretofore duly impaneled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and Chan Kiu Sing having been called and sworn as a witness on behalf of the United States, and having given his testimony; and, in connection with the testimony of said witness, the Government

having offered a Chinese letter and a translation thereof, heretofore offered and marked for identification, which are together admitted in evidence as U. S. Ex. 10; and Edward P. Morse, a witness on behalf of the United States, having been recalled for further examination, and having given his testimony; and George M. Sears, B. Moriarity, J. K. Wilson, H. T. Christian, Martha L. McCrea, Elizabeth Dickson, Mrs. Carrie McCrea, and Charles T. Connell having respectively [29] been called and sworn as witnesses on behalf of the United States, and having given their testimony; it is, at the hour of 12 o'clock M., ordered that this cause be, and the same hereby is continued for further trial until the hour of 2 o'clock P. M., of this day, until which time the jurors are excused.

(At 2 P. M.)

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants.

This cause coming on at this time to be further tried before the court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; John P. Doyle being present as shorthand re-

porter of the testimony and proceedings; and the roll of the jury having been called, and all being present; and Rowen Irwin having been called (out of order, by consent of counsel) as a witness on behalf of defendants, and having been sworn and having given his testimony; and Charles A. Kruse having been called and sworn as a witness on behalf of defendants, and having given his testimony; and, in connection with the testimony of said witness, the Government having offered a Receipt for \$60.00, which is admitted in evidence in its behalf as U. S. Ex. 11; and C. K. Badger having been called and sworn as a witness on behalf of the United States, and having given his testimony; and Edward P. Morse, a witness on behalf of the United States, having been recalled for further examination, and having given his testimony; and, in connection with the testimony of said witness, the Government having offered [30] for identification the following exhibits, which are for identification marked with the following exhibit designations, to wit: U. S. Ex. "A," Chinese letter of Sept. 3, 1911; U. S. Ex. 12-B, Chinese letter, 8th month, 3d day; U. S. Ex. 12-C, Chinese letter of Oct. 22, 1911; U. S. Ex. 12-D, Chinese letter of first part of June, 1911; U. S. Ex. 12-E, Chinese letter of Spring of 1912; U. S. Ex. 12-F, Chinese letter of 8th month, 3d day; U. S. Ex. 12-G, Chinese letter of 7th month, 11th day; U. S. Ex. 12-H, Chinese letter of June 13, 1911; U. S. Ex. 12-I, Chinese letter of June 4th, 1911; U. S. Ex. 12-J, Chinese letter of Apr. 13, 1911; U. S. Ex. 12-K, Chinese letter of April 14, 1911; and U. S. Ex. 12-L, Chinese

letter of April 7, 1911; and the Government having rested; and James Curran, D. B. Nuelle, J. R. Williams, Charles H. Quincy, William E. Deucon, David S. Stern, Frank W. Robinson, Joseph Morley and H. I. Tupman having respectively been called and sworn as witnesses on behalf of defendants, and having given their testimony; and counsel for the respective parties having stipulated that the Chinese letters heretofore offered and marked for identification as U. S. Exhibits 12-A to 12-L, inclusive, may be temporarily withdrawn by defendants from the custody of the Clerk, upon the leaving of a receipt therefor, by said defendants; it is, at the hour of 3:27 o'clock P. M., ordered that this cause be, and the same hereby is continued for further trial until Tuesday, the 31st day of March, 1914, at 10:30 o'clock A. M., until which time the jury are excused. [31]

[Minutes of Trial—March 31, 1914.]

At a stated term, to wit, the January term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the 31st day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants.

This cause coming on this day to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jurors having been called, in connection with the call of the roll of the entire panel of term trial jurors, and all the jurors being present; and Charles E. Kruse, a witness on behalf of the United States, having been recalled for further examination, and having given his testimony; and, in connection with the testimony of said witness, the Government having offered for identification an envelope postmarked Aug. 18, 1911, and a Chinese letter, which are together marked for identification U. S. Ex. 12; and the jury, at the hour of 11:28 o'clock A. M., having been excused until the hour of 2 o'clock P. M., of this day; and a question of law having been argued, on [32] behalf of defendants, by I. B. Dockweiler, Esq., of counsel for defendants, and on behalf of the Government by

Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States; it is, at the hour of 12:03 o'clock P. M., ordered that this cause be, and the same hereby is continued until the hour of 2 o'clock P. M., of this day for further trial.

(At 2 P. M.)

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants.

This cause coming on at this time to be further tried before the court and a jury heretofore duly impanelled herein; Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; John P. Doyle being present as shorthand reporter of the testimony and proceedings, and acting as such; and the roll of the jury having been called, and all being present; and the Government having offered the following exhibits, heretofore offered and marked for identification, each of said exhibits consisting of a Chinese letter and a translation thereof, which are admitted in evidence on behalf of the United States, to wit: U. S. Ex. 12-J; U. S. Ex. 12-L; U. S. Ex. 12-K; U. S. Ex. 12-I; U. S. Ex. 12-D; U. S. Ex. 12-H; U. S. Ex. 12-M; U. S. Ex. 12-A; and U. S. Ex 12-G; and Duke Stone, Esq., Assisant U. S. Attorney, of counsel for

the United States, and I. B. Dockweiler, Esq., of counsel for defendants, having stipulated that said exhibits may be temporarily withdrawn from the files by the shorthand reporter for use in the preparation of his transcript of testimony and proceedings, to be thereafter returned [33] to the files herein; and the Government having rested; and James M. Hunter, James E. Anderson and Dr. Thomas Filbel having respectively been called and sworn as witnesses on behalf of defendants, and having given their testimony; and the jury, at the hour of 3:06 o'clock P. M., having been excused from the courtroom temporarily during an argument of counsel; and a certain question of law having been argued by respective counsel; and the jury, at the hour of 3:14 o'clock P. M., having been called into court; and the roll of the jury having been called, and all being present; and Lee Shee having been called and sworn as a witness on behalf of defendant, and having given her testimony through Chan Kiu Sing, interpreter of the Chinese and English languages; and court, at the hour of 3:25 o'clock P. M., having taken a recess for 5 minutes; and now, at the hour of 3:30 o'clock P. M., Court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and Jung Kim, one of the defendants, having been called and sworn as a witness on behalf of defendants, and having given his testimony, through Chan Kiu Sing, interpreter of the Chinese and English languages; and Sam Yick, one of the defendants, having been called and sworn as

a witness in his own behalf, and having given his testimony; and defendants having rested; and Edward P. Morse, a witness on behalf of the United States, having been recalled for further examination in rebuttal, and having given his testimony; and court, at the hour of 4:20 o'clock P. M., having taken a recess for 5 minutes; and now, at the hour of 4:25 o'clock P. M., court having reconvened; and defendants, counsel and the shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and Edward P. Morse, a witness on behalf of the United States, being on the stand for further examination in rebuttal, and having given his [34] testimony; and Forest B. Owen having been called and sworn as a witness on behalf of the United States in rebuttal, and having given his testimony; and, in connection with the cross-examination of said witness, defendants having offered a Sketch, which is admitted in evidence in their behalf as Defts. Ex. "B"; it is, at the hour of 4:38 o'clock P. M., ordered that this cause be, and the same hereby is continued for further trial until Wednesday, the 1st day of April, 1914, at 2 o'clock P. M., until which time the jurors are excused. [35]

[Minutes of Trial—April 1, 1914.]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on

Wednesday, the 1st day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—Crim S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants,

This cause coming on at this time to be further tried before the Court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; John P. Doyle being present as shorthand reporter of the proceedings, and acting as such; and the roll of the jury having been called, and all being present; and said cause having been argued to the jury, on behalf of the Government, by Robert O'Connor, Esq., Assistant U. S. Attorney, of counsel for the United States, and on behalf of defendants by I. B. Dockweiler, Esq., and John G. Mott, Esq., of counsel for defendants, and court, at the hour of 3:25 o'clock, P. M., having taken a recess for 8 minutes; and now, at the hour of 3:33 o'clock P. M., court having reconvened; and defendants, counsel and shorthand reporter being present as before; and the roll of the jury having been called, and all being

present; and said cause having been further argued [36] to the jury, on behalf of the Government, by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States; it is, at the hour of 4:12 o'clock P. M., ordered that this cause be, and the same hereby is continued for further trial until Thursday, the 2nd day of April, 1914, at 10:30 o'clock A. M., until which time the jurors are excused. [37]

[Minutes of Trial—April 2, 1914.]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Thursday, the 2d day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAM YICK and JUNG KIM,
Defendants,

This cause coming on this day to be further tried before the court and a jury heretofore duly impanelled herein; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants

being present, on their own recognizance, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; John P. Doyle being present as shorthand reporter of the proceedings; and the roll of the jury having been called, in connection with the calling of the roll of the entire panel of term trial jurors, and all being present; and the Court having read to the jury its written instructions; and the requirements of Rule 22 of the Rules of practice of this Court as to presentation of written exceptions to the Judge's charge before the jury leave the box having been waived in open court by counsel for the respective parties; it is ordered that the instructions requested by defendants be, and they are hereby refused, except in so far as the same may have been embodied in the instructions given by the Court; and it is further ordered that exceptions be, and they hereby are noted herein to each and every of the instructions given by the [38] Court, and to the refusal of the Court to give each and every of the instructions requested by defendants, which the court refused to give; whereupon, at the hour of 10:48 o'clock A. M., the jury retire to consider their verdict.

(At 11:55 A. M.)

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants,

The jury having now, at the hour of 11:55 o'clock, A. M., been called into court; Robert O'Connor, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on their own recognizance, with their counsel, John G. Mott, Esq., John P. Doyle being present as shorthand reporter of the proceedings, and acting as such; and the roll of the jury having been called, and all being present; and the jurors having been asked if they have agreed upon a verdict, and having replied that they have not so agreed; it is ordered that the U. S. Marshal for this District take said jurors to some suitable place for their dinner, said dinner, for the jurors and the accompanying officers, to be at the expense of the United States, and that thereafter said Marshal return said jurors to their room for further consideration of their verdict.

(At 3:02 P. M.)

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants,

The jury, at the hour of 3:02 o'clock P. M., having come into court; Duke Stone, Esq., and Robert O'Connor, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; [39] defendants being present on their own recognizance, with their counsel, John G. Mott, Esq.; John P. Doyle being present as shorthand reporter of the testimony and

proceedings; and the roll of the jury having been called, and all being present; and the jurors having been asked if they have agreed upon a verdict, and having by their foreman replied that they have so agreed, and having been required to state their verdict, and their verdict having been read by the foreman; now, by direction of the court, said verdict is filed and recorded by the Clerk, said verdict being as follows, and the following being the record thereof, to wit:

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK and JUNG KIM,

Defendants.

We, the jury in the above-entitled cause, find the defendants, Sam Yick and Jung Kim, guilty as charged in the indictment.

Los Angeles, April 2, 1914.

FRED W. MARSHALL,

Foreman.

and said verdict having been read to the jury as so recorded, and the jurors having said that it is their verdict; it is now by the Court ordered that said jurors be, and they hereby are excused until Tuesday, the 7th day of April, 1914, at 10:30 o'clock A. M.;

and it is further ordered, on motion of John G. Mott, Esq., of counsel for defendants, and with the consent of Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, that defendants be, and they hereby are granted thirty (30) days within which to move for a new trial herein, to prepare, serve and file their proposed bill of exceptions herein, or take such other steps as they may be advised, [40] and that a stay of execution of judgment herein for thirty (30) days be, and hereby is granted said defendants; and it is further ordered, on motion of Duke Stone Esq., Assistant U. S. Attorney, of counsel for the United States, that the bail of defendants, now present on their own recognizance, be, and the same hereby is fixed at \$3,000.00 each. Defendants are remanded to the custody of the U. S. Marshall. [41]

[Verdict.]

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAM YICK and JUNG KIM,
Defendants.

We, the jury in the above-entitled cause, find the defendants, Sam Yick and Jung Kim, Guilty as

charged in the indictment.

Los Angeles, April 2, 1914.

FRED W. MARSHALL,

Foreman.

[Endorsed]: 575. Crim. U. S. District Court, Southern Dist. of Calif. Southern Division. United States vs. Sam Yick et al. Verdict. Filed April 2, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [42.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 575—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM YICK, and JUNG KIM, *alias* JUNG CHUNG,

Defendants.

Motion for a New Trial.

Come now Sam Yick, and Jung Kim, *alias* Jung Chung, and each of them, and move said Honorable Court to vacate and set aside the verdict of guilty herein rendered and recorded on the second day of April, 1914, and to grant to said defendants, and each of them, a new trial herein, for the following reasons;

I.

That said verdict is contrary to law.

II.

That said verdict is contrary to the evidence.

III.

That the said Court misdirected the said jury in matters of law.

IV.

That the said Court has erred in the decision of questions of law arising during the course of the trial.

V.

That the said Court erred in certain particulars of its general charge, excepted by the defendants, and each of them, at the time.

VI.

That the said Court erred in refusing to give to the [43] jury certain charges specially asked for by the defendants, and to which refusal said defendants, and each of them, at the time duly excepted.

VII.

The Court erred in refusing to compel the United States District Attorney and the Immigration officials, and each of them, to surrender and to deliver to the defendant Sam Yick upon his demand therefor those certain letters and papers secured and obtained from the trustees in the Sam Yick Company bankruptcy case, and which letters and papers were subsequent to such demand, and against defendants' objections, introduced in evidence by plaintiffs, and to which action of the Court defendants duly excepted.

VIII.

That the said Court erred in admitting in evidence, against defendants' objections, the plaintiffs' exhibits, marked respectively: United States Exhibits 12-A, 12-B, 12-C, 12-D, 12-E, 12-F, 12-G, 12-H,

12-I, 12-J, 12-K 12-L, 12-M, and 8, and each of them, and to which action of the Court defendants duly excepted.

IX.

That there were other errors of law appearing upon the trial prejudicial to the defendants, and each of them.

X.

Misconduct on the part of the counsel for the Government, which prevented defendants from having a fair and impartial trial, and to which defendants duly excepted.

The said motion will be made and based upon the minutes of the Court, including the notes of the evidence taken by the Judge who tried said cause, as well as all the evidence given and received in the case and transcribed by the reporter, and all proceedings in the case so transcribed, which also included the whole [44] testimony in the case and all the rulings made therein and excepted to by the defendants, and all other proceedings, and also upon all the pleadings, proceedings, records, exhibits, instructions and papers on file in said action with the clerk in the clerk's office of said court.

Dated April 27th, 1914.

MOTT and DILLON,

ISIDORE B. DOCKWEILER,

Attorneys for said Defendants.

[Endorsed]: No. 575—Criminal. Dept. In the District Court of the United States, in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Sam Yick and

Jung Kim, *alias* Jung Chung, Defendants. Motion for a new trial. Filed Apr. 30, 1914, at 55 min. past 4 o'clock, P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. Service of the within motion is hereby admitted this 27 day of April, 1914. Duke Stone, Asst. U. S. Atty., Attorney for Pltf. Isidore B. Dockweiler, Suite 502 Douglas Bldg., Office Tel. Main 1320 (Sunset), Home 1320, Los Angeles, Cal., Attorney for Defendants. [45]

**Copy Order Denying Motion for New Trial, and the
Judgment of the Court.**

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the 4th day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAM YICK and JUNG KIM,
Defendants.

This cause coming on at this time to be heard on defendants' motion for a new trial; Duke Stone, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present on

bail, with their counsel, John G. Mott, Esq., and I. B. Dockweiler, Esq.; John P. Doyle being present as shorthand reporter of the proceedings, and acting as such; and said motion for a new trial having been argued, in support thereof, by I. B. Dockweiler, Esq., of counsel for defendant; and this cause having been submitted to the Court for its consideration and decision on said motion for a new trial and the oral argument thereof; it is by the Court ordered that defendants' motion for a new trial be, and the same hereby is denied, to which ruling of the Court, on motion of defendants and by direction of the Court, exceptions are hereby noted on behalf of said defendants; and said cause thereupon coming on for the sentence of defendants; and statements in mitigation of sentence having been made by John G. Mott, Esq., and I. B. Dockweiler, Esq.; and [46] statements concerning sentence having been made by Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States; the Court thereupon pronounces sentence upon said defendants for the offense of which they stand convicted, namely: the offense of conspiring to smuggle Chinese laborers into the United States by land, in violation of Section 37 of the United States Criminal Code, as follows, to wit: The Judgment of the Court is, that the defendant Sam Yick be imprisoned for the term of one year in the County Jail of Kern County, California, and the Judgment of the Court is, that the defendant Jung Kim be imprisoned in the County Jail of Kern County, California, for the term of six (6) months; whereupon, on motion of said defendants, by their

said counsel, it is ordered that a stay of execution of judgment herein until Monday, the 1st day of June, 1914, be, and the same hereby is granted said two defendants; and it is further ordered, on motion of defendants, by their said counsel, and with the consent of Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, that said defendants go and remain under their present bail bond until Tuesday, the 5th day of May, 1914, at 2 o'clock P. M.
[47]

[Certificate of Clerk U. S. District Court to Judgment-roll.]

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK et al.,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled cause, and I further certify that the foregoing papers hereto annexed constitute the Judgment-roll in said cause.

Attest my hand and the seal of said District Court,
this 8th day of May, A. D. 1914.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Murray C. White,

Deputy Clerk. [48]

*In the United States District Court Within and for
the Southern District of California, Southern
Division.*

Hon. OLIN WELLBORN, Judge Presiding.

No. 575—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM YICK and JUNG KIM, *alias* JANG CHUNG,
Defendants.

**Bill of Exceptions on Behalf of Defendants Sam
Yick and Jung Kim.**

BE IT REMEMBERED that heretofore the grand jury of the United States of America in and for the Southern District of California, Southern Division, did find and return in the above-entitled court its indictment against Sam Yick and Jung Kim, *alias* Jang Chung, and thereafter said defendants appeared in said court, having duly pleaded as shown by the record therein, and the case being at issue, the same came on regularly for trial on the 24th day of March, 1914, before the said District Court, Hon. Olin Wellborn, Judge Presiding, the plaintiff, United

States of America, being represented by Duke Stone, Esq., and J. Robert O'Connor, Esq., and the defendants by John G. Mott, Esq., and I. B. Dockweiler, Esq. Upon instructions the clerk read the indictment upon which the defendants were to be tried to the jury which had theretofore been duly impanelled and sworn to try the case. Thereupon the following proceedings were had:

[Testimony of Edward P. Morse, for the Government.]

EDWARD P. MORSE, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE. [49]

My name is Edward P. Morse. At the present time I live in Santa Barbara, California. My business or occupation is that of immigrant inspector. I have been such immigrant inspector since May 28th, 1910. In May, 1911, I was stationed at Bakersfield, California, as immigrant inspector, and at that time had been so stationed for about four and one half months. I know both the defendants Sam Yick and Jung Kim, I became acquainted with both of them at Bakersfield about January, 1911. I would see the defendant Sam Yick about once a week from January to May, 1911, the occasions of my seeing him would be when I was in search of some Chinaman that I had occasion to look up in connection with certain cases or certain papers that I had to prepare. I wanted to find out who the Chinaman was and would ask some Chinese who talked English where he was so that I could locate him.

(Testimony of Edward P. Morse.)

Q. Did this defendant Sam Yick come to you or have any talk with you at any time in reference to smuggling Chinese?

A. Yes, sir, he had a talk with me in reference to smuggling Chinese the first time on the 8th of May, 1911.

Q. Will you please state to the jury where you were and the facts and circumstances as they occurred and what he said?

A. I had a paper sent me from the Los Angeles office to look up a Chinaman and get an application for a duplicate certificate, by the name of Woo Jung Sing. The Chinaman was unknown to me and among places I went to Sam Yick's office to see if he knew him. He told me he did know him very well, and I asked him where he was and he said he was on a ranch about five miles south of Bakersfield, and I asked him if they had any phone there so that he could call him up and ask him to come in, and he said no. I then asked him if he could get word to him to have him come in or to let me know when he was in town next time, and he said he couldn't do that very well, [50] and he said he knew this man couldn't get away very easily from where he worked and he wanted me to go out to this ranch where he worked.

At first I told him I didn't care to go, but he was very insistent, and said he would take me out in a rig at his own expense and bring me back, and that he wanted to have a talk with me any way, and that would suit better all around if I would go out with

(Testimony of Edward P. Morse.)

him. So I went out with him in the afternoon of that day.

Q. (By Mr. STONE.) What date was that?

A. The 8th of May, 1911.

Q. Where did you go from?

A. From Sam Yick's store. I met him at the store.

Q. What town and street?

A. Bakersfield, California, number 723 Eighteenth Street. I met him at the store and went right from there. He had the rig there. On the way out he asked me what salary I was getting, and whether I had a family to support, and if I could save any money off the salary I was getting, and if I had any opportunity to make money on the side, and how much money I made on the side; but I answered rather shortly: I didn't consider it any of his business; and for the time being the subject was dropped. Then I went out there and examined this man, and on the way back he brought up the matter again and he asked me if I didn't want to make more money than I was making [51] and I asked him how he meant. Well, he said that I arrested a good many Chinese around Bakersfield, and that if I would bring those Chinese to his store instead of taking them to the jail he would pay me one hundred dollars for each one brought there if I would release them. I asked him who would pay the money and he said he would individually. I asked him how he could afford to do that. Well, he said these Chinese would pay the money back to him and he would charge them in-

(Testimony of Edward P. Morse.)

terest. He would make something off it and I would make one hundred dollars. I told him I would consider it. Then he said if I wanted to make more money than that, if I could prepare papers for some Chinese that were in Mexico, so as to enable them to get to Bakersfield, he would be able to give me a good deal of business in that line, and I asked him where the Chinese would come from. Well, he said he had some friends in Juarez, Mexico, that wanted to come to Bakersfield; that he had letters from them in reference to coming here, and he wanted to know if I couldn't prepare papers purporting to show that these men were native-born citizens of the United States that would allow them to pass the inspectors on the way. He asked me how many inspectors there were between El Paso and Bakersfield, and I told him there was a great many located along the way, and he said I understood about making these papers and ought to be able to make a paper that would pass inspection down there; and I told him it would be pretty hard to do, but I would see what I could determine on it—see what could be done; and then he said it was so hard to bring them from Juarez that the best proposition would be to bring them in from down at Tia Juana, from Ensenada; that there was a lot of Chinese there that would come. Prior to this I had asked him or he had told me how much there would be in it for these Chinese in Juarez. He said there was two or three there that he knew would come, and probably more would [52] come if they could, and he said if I could fix up these papers so

(Testimony of Edward P. Morse.)

that they would pass I would get one hundred and fifty dollars for each paper, and he said it would be easier to get them in from Ensenada, if it looked good to me and I wanted to accept money that way, that he would bring in a good many Chinese from Ensenada, that he would write down immediately and see how many there were there; that he knew of several that would come and he knew there were a good many more; and that if I could get the Chinese in from Ensenada and bring them to Bakersfield and pay for them he would pay me two hundred and fifty dollars for each Chinese so brought in; and I told him I had never drawn up any papers of that sort and would have to get some data as to the best way to draw them up, and so forth, and he asked me if I couldn't use my seal. He supposed that I had a seal similar to the Commissioner's seal.

Mr. DOCKWEILER.—Now, the witness knows, if your Honor please, that the statement that he supposed—

A. (Witness continuing.) Well, he asked me if I didn't have a seal like the Commissioner's seal.

Mr. DOCKWEILER.—All right; why didn't you state that?

Mr. STONE.—We object to counsel arguing with the witness.

The COURT.—Do you mean that that was a part of the conversation, or was it your own idea?

The WITNESS.—No, sir, that was a part of the conversation.

The COURT.—I so understood it.

(Testimony of Edward P. Morse.)

A. (Witness continuing.) He said that I had a seal exactly the same as the Commissioner's seal. I told him that I did not have a seal exactly the same, but I didn't tell him that I didn't have any seal. I told him it would be necessary for me to look the matter up further before I could say anything further in reference to the matter, and he said all right, and in the meantime he would write down to Ensenada and find out [53] how many Chinese there would be ready to come and with that understanding I left him. That was the substance of our conversation that took up an hour and half or so, and I went home and immediately wrote a letter explaining the circumstances to the superior officer in Los Angeles asking for instructions as to what I should do.

Mr. DOCKWEILER.—Now, if your Honor please, we move to strike out that statement on the ground that it is incompetent, irrelevant and immaterial and not in reply to any question put to the witness at all and not pertinent in any way as to what he did.

The COURT.—I do not know about its pertinency, and I am not sure—

Mr. STONE.—I asked him to go ahead and state what was done and said on that day and all the facts connected with his conversation with him—the substance of it. I think it would be competent in a case of this kind.

The COURT.—To show his relation to the whole case I suppose?

Mr. STONE.—Yes. In other words, I presume

(Testimony of Edward P. Morse.)

the officer will be blamed for it, but I want to show that he acted under instructions of his superior officers, not only the immigration officers but the United States attorney's office here at that time. That is for the purpose of showing his good faith and his testimony will show that he went on through with the transaction until it was finally consummated, and he ought then to be permitted to show why he did it and under whose instructions as bearing up the question of his good faith.

The COURT.—I suppose that is the question.

Mr. DOCKWEILER.—Now, your Honor, we certainly contend right at the very threshold of the trial of this case that this witness cannot make evidence for himself in the absence of the defendant. Why, your Honor, what relevancy has his testimony [54] on the proposition that after he talked to Sam Yick, as he claims to have done,—what right *has to* say that, leaving Sam Yick, he sat down and wrote a letter to anybody—to your Honor, to the District Attorney or to myself? What difference does it make? What he did was outside of the presence of the defendant.

The COURT.—I understand that; but is it not competent always to show the relation of the witness?

Mr. DOCKWEILER.—In this connection?

The COURT.—Yes.

Mr. DOCKWEILER.—No, your Honor.

The COURT.—I presume what they want to show is—he has already developed that he was an officer, and that when this proposition was made to him he

(Testimony of Edward P. Morse.)

asked instructions of his superior as to what he should do, and that whatever else he did in the matter was pursuant to instructions.

Mr. STONE.—That is the point.

Mr. DOCKWEILER.—Now, your Honor, can that be done?

The COURT.—I am inclined to think it can. I will hear from you on that subject, however.

(Whereupon, the jury was duly admonished and excused until two o'clock P. M., and retired from the courtroom.) Thereupon argument and discussion was had on the objection above stated. At two o'clock P. M., the jury being present in court and defendants being present with their counsel, further discussion was had on the motion to strike out and motion was read.)

Thereupon, EDWARD P. MORSE, was recalled on behalf of the Government, and testified further as follows:

The COURT.—If you will add one other ground, I will sustain the objection,—that it is not best evidence.

Mr. STONE.—Yes, I will concede that, your Honor. Well, I might start a new question and cure that. The contents of [55] the letter, of course, is not competent.

The COURT.—Very well.

Q. (By Mr. STONE.) On your return from the trip there on May 8, did you write a letter to your superior officers here? A. I did.

(Testimony of Edward P. Morse.)

The COURT.—That motion to strike out is allowed. Now, the fact that he wrote a letter may or may not be incompetent; I cannot tell.

Mr. DOCKWEILER.—We will object to the question on the ground that it is incompetent, irrelevant and immaterial, for the sake of the record.

The COURT.—You are not proposing to go into the contents of the letter?

Mr. STONE.—No; I expect to follow this question up by asking him if he went in to see the superior officer.

The COURT.—Then just state what you expect to prove.

Mr. STONE.—I expect to prove that he wrote a letter about it to the superior officer on I believe the same day, May 8, and that he received a reply and then he came in to see the superior officer, Mr. Connell, and that he was instructed by Mr. Connell, after consultation with the then assistant United States Attorney, to go ahead and try to apprehend him by going in with him; then I expect to follow that up by showing that before Mr. Connell would take the initiative he wrote to his superior officers and got authority from them, even higher officers than Mr. Connell, the inspector in charge here, before this man did go ahead and participate in the matter.

The COURT.—I don't know that that instruction from higher officers has anything to do with the case.

Mr. STONE.—Well, I did not intend to lay any stress on the fact that they were higher officers, but

(Testimony of Edward P. Morse.)

the fact that he consulted the officer or officers here in charge.

The COURT.—It strikes me now that they would be competent [56] Mr. Dockweiler. I will hear from you if you want to say anything further. It is simply showing the attitude, or at least the claimed attitude of this witness. Your contention, I understand, will be different.

Mr. DOCKWEILER.—Yes.

The COURT.—But it seems to me that testimony is competent, as going to the credibility of the witness if nothing else, showing his relation in the case.

Mr. DOCKWEILER.—Then it is understood that we object to this line of testimony on the ground that the same is incompetent, irrelevant and immaterial, and self-serving, and that we have an exception to the admission of that type of testimony in evidence.

EXCEPTION OF DEFENDANT NOTED.

The COURT.—Oh, yes, certainly * * *

Mr. STONE.—I can go ahead and examine this witness as to all other matters, if your Honor desires, and then go back to this.

The COURT.—Very well. Then I will not rule on your matter for the present, Mr. Dockweiler; it is withdrawn for the present. Just let him testify to what occurred without undertaking to explain his relations to the case.

(Witness continuing (Edward P. Morse) testified as follows:)

The next conversation I had with the defendant, Sam Yick, was had at his store in Bakersfield about

(Testimony of Edward P. Morse.)

nine o'clock in the evening of May the 17th. I went to his store in response to a letter I received from Sam Yick.

(The letter referred to was here introduced in evidence as United States Exhibit No. 1 and read to the jury by Mr. Stone, and is as follows:) [57]

[United States Exhibit No. 1—Letter Dated May 9, 1911, Ah Sam to E. P. Morse.]

Bakersfield, Cal., May 9, 1911.

Dear Sir:—

Mr. E. P. Morse

I want you to come our my store and visiting to you
If you come tomorrow My 10 1911 at P.M. 8 O'clock.

AH. SAM,
723 18th St.,
Bakersfield,
Cal.

(Witness—continuing.) I received this letter in the sheriff's office where I got my mail, from Sam Yick.

Q. Did you know at that time whether Sam Yick had any other name or went by any other name than Sam Yick? A. I did.

Q. What was the name?

A. He belonged to the Jung family. I don't believe I could give his exact Chinese name, but it was Jung Chung Kim, I think. I might say further that in speaking of him he is sometimes spoken of as Ah Sam—Mr. Sam.

Q. Did you have any conversation with him in reference to this letter after you received it?

(Testimony of Edward P. Morse.)

A. Yes, sir; I did.

Q. Was anything said about who wrote the letter?

A. I asked him if he wrote the letter personally and he said he did and I complimented him on his way of writing English.

(Witness continuing.) A. Mr. Giddings went to Sam Yick's store with me on the night of May the 17th and stayed outside the store. I went in to the store and saw Sam Yick. He took me to a room in the rear of the store and asked me if I had not been able to prepare any papers by that time. I told him that I had not done anything on it up to that time, that I had been busy, and he said that he had thought the matter over and concluded that he could make a good deal of money by going into the business, that he had already written to Ensenada to make arrangements for the Chinamen to come from there, and that he had in mind in particular four [58] whom he knew would be glad to come right away, and that two hundred and fifty dollars a piece would be available for these four as soon as they arrived here at Bakersfield, and he asked me if I would be able to have the papers prepared for them by the time they got to Bakersfield. I told him that I did not know for certain. He told me to go to work and get the papers ready as soon as I could because the men would be ready to come over at any time, he said I would not be expected to assist in getting the men over, that he would look out for that end of it altogether, but he said that he would expect me to get the men past the immigration officers

(Testimony of Edward P. Morse.)

on the way. He asked me who inspected the trains at San Diego, and if I knew some way I could get the men past the inspecting officer there, and he asked me if I couldn't get the inspecting officer at San Diego [59] to go in with me on the proposition; he said that if I got two hundred dollars I could afford to give him (the inspecting officer at San Diego) fifty, and if I got two hundred and fifty dollars, I could afford to keep two hundred dollars and give this other man fifty. I told him that I thought perhaps it could be arranged that way; he then told that he would send a man down to San Diego to carry these men to Bakersfield, and he suggested that I should have the inspector in San Diego come up to Bakersfield and meet the man who was to go down to guide the Chinese coming across so that the San Diego inspector would know him in case he saw him with the Chinese and would not arrest them. He said that he had written for the photographs of the four Chinese that were to come over, and he was expecting to hear from them at any time, and as soon as he heard from them he would let me know. Mr. Giddings is the man in whose house I was living in at Bakersfield at the time, and during this conversation I had with Sam Yick at his store, Mr. Giddings was right across the street from the store, he walked from his house down to the store with me.

Q. (By Mr. STONE.) What are Mr. Giddings' initials, if you know?

A. William something. I don't remember the other initial. I couldn't tell now. * * *

(Testimony of Edward P. Morse.)

Q. (By the COURT.) Who is he?

A. He is the man with whom I roomed at the time, and I took him along for a corroborating witness to the fact that I was there at the store.

Mr. DOCKWEILER.—Now, we move to strike out the statement of the witness to the effect that he took Giddings along as a corroborating witness on the ground that it is a voluntary statement by the witness, made by him at this time for the purpose of strengthening and building up the credibility of his [60] testimony. It was not in answer to any question propounded to the witness.

The COURT.—If there is any harm done I am rather inclined to think the occupant of the bench is absolutely not cognizant of it. I asked him who was this man Giddings, and he was explaining, in answer, Mr. Giddings' relation to the case. But you are entitled to your exception nevertheless. Now, what is the motion?

Mr. DOCKWEILER.—Our motion was to strike it out on the ground that it was not—

The COURT.—I think it is an entirely proper matter to be brought out before the jury as to who Giddings was.

Mr. DOCKWEILER.—There is no doubt that your Honor had a right to ask him who Mr. Giddings was, and it was quite proper for him to reply, "Yes, he was my room mate."

Mr. STONE.—He was not his room mate; he roomed at this man's house.

Mr. DOCKWEILER.—Well, describing who he

(Testimony of Edward P. Morse.)

was, identifying him. But he supplemented that by—

The COURT.—Giving his relation to the case, and that is really the information I wanted, and I assumed it had gone into the record already; but I want to give counsel opportunity to make up their record in this matter, and it might be as well to strike it out and give them an opportunity to object to it before it is stated. The motion will be granted.

Q. (By Mr. STONE.) Do you know why Mr. Giddings happened to be there that night?

A. Yes, sir.

Q. Why?

A. He went along at my request to act as a corroborative witness—

Mr. DOCKWEILER.—Now,—

The COURT.—Now, one minute. [61]

Mr. DOCKWEILER.—May I ask the Court to instruct the witness to kindly pay attention to the questions, and to answer them directly?

Mr. STONE.—I asked, do you know why he went? And he said, “Yes,” and I said, “Why?”

Mr. DOCKWEILER.—Will the reporter repeat the question? (Last question read.)

Mr. DOCKWEILER.—We object to it as incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. DOCKWEILER.—Exception.

Mr. STONE.—I will stipulate that the objection may go before the answer.

(Testimony of Edward P. Morse.)

The COURT.—The motion to strike out, if there was one, is denied.

(Witness continuing.) I did not leave the store that night until about 10:15; there were some other Chinese in the store but the room in which we had our conversation was in the rear of the store and these Chinese were in the room in front and Sam Yick took me back to his private room in the rear of the store.

Q. Then when did you next see him?

A. Well, I couldn't give you the exact date. I saw him around town several times after that when he would ask me if there was anything particularly new and I told him No, until I went on my vacation, which was about the first of July that year."

(Witness continuing.) The next time I saw Sam Yick, it was just before I went on my vacation, and I told him that if he wanted to write me at any time while I was away, to write to me care of Immigration Office, Los Angeles. While I was away on my vacation at Ocean Park, California, I received a [62] letter from Sam Yick, which he afterwards said he had written himself. (The letter in question was here introduced in evidence as United States Exhibit No. 2. It was read to the jury by Mr. Stone and is as follows:)

[United States Exhibit No. 2—Letter Dated Bakersfield, August 4, 1911, Sam Yick Kim Kee to Edward P. Morse.]

Bakersfield, Cal., August 4, 1911.

Dear sir:

Mr. Edward P. Morse.

I am glad to see you. How you are getting along. I would like to ask you when your coming to Bakersfield. When you come back I like to visit to your. Please return the mail.

Yours truly,

SAM YICK.

KIM KEE. [63]

(Stamped with rubber stamp:)

Sam Yick Kim Kee Co.

Merchandise & Groceries

Wholesale and retail

Phone Main 1137, P. O. Box 363

723 18th Street.

Bakersfield, Cal. U. S. A.

(Witness continuing.) The next time I saw the defendant, Sam Yick, was August the 10th. I went to his store again on the evening of that day with Mr. Giddings. Mr. Giddings remained outside the store, and Sam Yick and I went into the back room of the store.

Q. Did you have a conference with Sam Yick there? A. I did.

Q. Go ahead and state the conversation fully.

A. He said he had heard from Ensenada two or

Chinese characters.

Chinese characters.

(Testimony of Edward P. Morse.)

three times since I had seen him; that he had received the photographs of four Chinese who he said were ready to come just as soon as they could get the papers prepared for them and he wanted me to—he asked me if I had seen the inspector at San Diego and if I had made arrangements for his co-operation—the inspector who inspected the trains there—and made arrangements for his co-operation to pass the Chinese when they were brought to San Diego. And at that time he told me who was going to be the guide, who would go down after them. He said that Jung Kim would. Jung Kim was his partner in the store there, and I was acquainted with him. And he showed me the photographs of these four Chinese and told me to prepare the papers as soon as possible. I told him I didn't think it would hardly—that I couldn't prepare the papers right here, that arrangements were not made, and that if they expected to bring their Chinese up right away they could bring them up and I would see to preparing the papers later on. He said they would have to have some means of identification. And in talking it over it was decided that the photographs would be used as a means of identification and that [64] the names of these Chinese would be written on the photographs. But he said before he went any further he would have to talk with another man and see whether or not they would want to bring them in before they had their papers, and he said to come and see him a couple of nights after that and he would know whether he wanted to go in on that

(Testimony of Edward P. Morse.)

proposition or wait until the papers were prepared.

The next time I saw Sam Yick was at his store on the evening of August the 12th I went there alone. Sam Yick said that he had seen the other Chinaman that was interested and that it was all right to go ahead with the photographs alone and prepare papers later on, but that the papers would surely have to be prepared some time, the sooner the better; He said that Jung Kim was going to Tia Juana for the Chinese and would bring them up to San Diego to stay for a day or two with a friend of his, to wash and change their clothes and look Americanized so that they would not be noticed on the train. Just as I was leaving the store that night, Sam Yick told me that it would be decidedly unhealthy for me if I ever started to give any information on him. He said that means had been taken to fix me in case I did give any information and that if he couldn't get me he could get some of my family. He went on to state that he knew just how many there were in my family and who they were and where I lived at Kern, and also where I had been in Ocean Park.

Q. (By Mr. STONE.) And did he give this information correctly?

A. Yes, sir, he did. [65]

(Witness continuing.) At this conversation on August 12th Sam Yick also asked me to make arrangements to have the inspector from San Diego come to Bakersfield to make final arrangements for bringing the Chinese over. Afterwards on the 24th of August, Mr. A. G. Bernard, the inspector at San

(Testimony of Edward P. Morse.)

Diego came to Bakersfield. After his arrival, at 8 o'clock in the evening of August 24th, Mr. Bernard and I went to Sam Yick's store; at first only Bernard, Sam Yick and myself were present and all that was said at first was to introduce Bernard to Sam Yick. Very shortly afterwards the defendant Jung Kim came in. Thereupon Sam Yick introduced Mr. Bernard to Jung Kim and told Mr. Bernard that Jung Kim was the man he was going to send down and he pointed out to him that one way of recognizing Jung Kim again was by reason of the fact that he had a double thumb on his right hand. Sam Yick then went on to say that if ever it was necessary to send a message about the Chinese they would [66] be referred to as so many pieces of goods; he also questioned Mr. Bernard about the number of immigration officers in San Diego and how they did the inspection of trains and how many inspectors there were between San Diego and Bakersfield. He also questioned Mr. Bernard in reference to where the soldiers were located at Tia Juana and below, between there and Ensenada and asked if things were calm enough down there so that the Chinese could be brought through. He also inquired of Bernard the best way to bring in the Chinese; and if it was likely that any of the other inspectors would be around at the wrong time and arrest the Chinese, and in case of this happening if he (Bernard) would be able to get them out. He told Bernard that all arrangements were made with me and that I would pay Bernard and whatever he got he would get through me. At

(Testimony of Edward P. Morse.)

this conversation also, and while Mr. Bernard was there, Sam Yick stated that he didn't want to send photographs as a means of identification as they were likely to get broken and that it would be better to furnish some kind of an identification card to show who the Chinese were instead of a photograph, and he said that he would write the names of the Chinese on a slip of paper in Chinese characters and would have me write the names on the slips in English to show Mr. Bernard who they were; these slips were to be furnished in duplicate, the originals to be sent to Ensenada to the Chinese and the duplicates to be sent to Inspector Bernard to be compared with the originals when the Chinese came over. Sam Yick said these slips would be brought to me at my house the next night. On the night of August 25th Sam Yick and Jung Kim came to my house. I was then rooming in Kern on Baker Street what is now East Bakersfield, at Mr. Giddings house. Before they came I had raised the window of my room about six inches and placed Mr. Giddings outside. It was probably about [67] eight o'clock in the evening when Sam Yick and Jung Kim came. They told me that they had written four cards in Chinese characters, and said that the names of the Chinese were Dock Yook, See Chew, Wah Sung and Ah Sing. I took each piece of paper as they named them, and above the Chinese characters I wrote these same names in English and put my initials underneath the Chinese characters; they only had the original slips and these I returned to them after writing on them

(Testimony of Edward P. Morse.)

the names in English and my initials.

Q. (By Mr. STONE.) Could you read Chinese at that time or at any other time? A. No, sir.

Q. And couldn't write it? A. No, sir.

Q. Examine these and see if these are the slips you refer to.

A. Yes, sir, those are the four same slips they brought to me that evening.

Q. Do you know who wrote the English on each one? A. Yes, sir, I wrote that myself.

Q. And who handed you the slips?

A. Sam Yick gave them to me.

Q. The Chinese had already been written on them?

A. Yes, sir; that was written when they offered them to me. They read the names and told me what they were and I wrote the name as it sounded in English.

(Slips offered in evidence as United States Exhibit No. 3 shown to the jury, four in number and are as follows:)

[United States Exhibit No. 3—Memoranda Slips.]

(a) "Wah Sung

(Chinese characters)

E. P. M."

(Endorsed) "B. M.

Sep. 15" [68]

(b) "Dock Yook

(Chinese Characters)

E. P. M."

(Endorsed) "B. M.

Sep. 15"

(Testimony of Edward P. Morse.)

- (c) "See Chew
(Chinese Characters)
E. P. M."
(Endorsed) "B. M.
Sep. 15"

(d) Ah Sing

A. G. B. Received from Chung Kim At 5 P. M. Sept. 12/11.	(Chinese characters) E. P. M."	He stated that this Chinese had already crossed likely via Calex- ico.
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(Witness continuing.) Subsequently on August the 28th the defendant, Jung Kim, met me at the Santa Fe Station in Bakersfield and gave me the duplicates of these original slips which I marked and initialed in the same way as the originals. Jung Kim said that the slips were to be given Bernard at San Diego to identify the four Chinese.

(Duplicate slips shown to the jury and filed as United States Exhibit No. 4, being four in number as follows:)

[United States Exhibit No. 4—Memoranda Slips.]

- (a) "Dock Yook
(Chinese Characters)
E. P. M."
(Endorsed) 'Duplicate'
- (b) "See Chew
(Chinese characters)
E. P. M."
(Endorsed) 'Duplicate'
- (c) "Wah Sung
(Chinese characters)
E. P. M."
(Endorsed) 'duplicate'

(Testimony of Edward P. Morse.)

(d) "Ah Sing

(Chinese characters)

E. P. M."

(Endorsed) 'duplicate' [69]

At that meeting at the Santa Fe Station on August the 28th, I asked Jung Kim when he expected to go. He said just as soon as he got another letter saying things were ready, he would go down to Tia Juana, and he would keep the Chinese at the Hop Wo Lung Company, 933 Second Street, San Diego.

The next time I saw Sam Yick and Jung Kim, was on the 4th of September; they came to my house about eight o'clock in the evening of that day. Mr. Giddings was outside listening at the window. They said they had received a letter from Ensenada saying that the Chinese were ready to come and would be at Tia Juana in about a week, that they thought things were quiet down there and that they could get through without any trouble with the soldiers and asking them to send Jung Kim down to San Diego and when he got there to have him call up Tia Juana on the telephone and find out when the Chinamen would arrive. Jung Kim then stated that he expected to leave on September the 7th. The next day I saw Sam Yick on the street. He told me that Jung Kim would go on the 8th on the noon train instead of the 7th. On the 8th I was at the Southern Pacific Depot and saw Jung Kim buy a ticket and take the train south. I saw his ticket, it read San Diego.

(Testimony of Edward P. Morse.)

I next saw Sam Yick on September the 16th. He came to my house on the afternoon of that day about three o'clock. He asked me if I had heard anything from Jung Kim. I told him I had not, and he then produced a telegram which he said he had just received from Jung Kim, which he wanted me to read, and asked me if I understood it; he handed me the telegram and I read it, the first part of it was in Chinese words, there were about eight or nine Chinese words, and then in English: "I come back to-morrow. [70] Signed "Jung Chong." Sam Yick said that those names meant the same in Chinese as See Chew, Dock Yook and Wah Sung, and meant that they had been arrested, he said it meant that the officers had arrested those three men, he wanted to know what I thought of it or what was going on, and I told him I didn't know anything about it, that that was news to me and the first intimation I had had of anything of the sort. Sam Yick said he would be at the postoffice about one o'clock in the afternoon of the next day Sunday, and for me to meet him there and see if either of us had received any additional word at that time. I met him the following day at the postoffice and neither one of us had heard anything further.

On the 19th of September Sam Yick came to my house and told me that he had received a letter from Jung Kim saying that the Chinese had been arrested in San Diego and were held there by the police, and he asked me to write to inspector Bernard to use his influence to get the Chinamen out of jail and either

(Testimony of Edward P. Morse.)

send them back to Mexico or hold them until Jung Kim could be sent down there; he told me to tell inspector Bernard to use a little piece of money if it would do any good.

On September the 20th I met Jung Kim at the Southern Pacific Depot at Bakersfield. I saw him as he got off the train, I asked him what the trouble was and he said he had been down to Tia Juana and had got the Chinese, but that as he was coming up along the railroad track at night, the Chinese got frightened and ran away, that he had lost them, and the next day they had wandered in to San Diego and had been arrested by the police there and were being held by them.

On the evening of September the 20th Sam Yick and Jung Kim came to my house and asked me to send a telegram to Bernard and find out if the Chinamen were to get loose. They said they had heard from San Diego, that the Chinese would be tried in the [71] lower court that day, and would be tried in the Superior Court the following day, that then they would be released and returned to Mexico; that these Chinese were to say that they kept a store in Tia Juana and that the Mexican soldiers came in there shooting their guns and disturbing the peace generally so that they ran out of the store and ran all the way to San Diego and didn't know where they were. I asked Sam Yick if he still wanted Bernard to use any money and he said no, that they were going to get loose any way, and as soon as they did, Jung Kim would go down again and bring them up,

(Testimony of Edward P. Morse.)

as it was originally arranged.

The next conversation I had with Sam Yick was on September the 26th. He came to my house in the afternoon alone and told me that he had heard from his friend that the Chinese had been ordered deported to China by the immigration authority and he wanted me to do everything I could to get them sent to Mexico instead, as their deportation to China would have a bad effect on the other Chinese there, might break up the whole proposition, and he said that he would lose a lot of money by it if they went to China. He said that if they were deported to Mexico they would try to come again, and it would not scare back the rest of the Chinese that were considering coming. He said he had gotten two letters from Ensenada from Chinese that were anxious to come over, but he knew that if these three men were deported to China they wouldn't come; it would break up the whole thing; and he said these Chinese in Ensenada had written that they didn't have the money to put up themselves, but that they had written him the names of some Chinese firms both in San Francisco and Fresno who would guarantee the money to Sam Yick; that if he would put up the money for them these other companies would put up a bond to guarantee Sam Yick's money returned to him—that he would get the money back again; and he said he was going to leave for San Francisco the following day to see [72] these people and see what arrangements could be made about a bond to secure him for any Chinese that came up, and he

(Testimony of Edward P. Morse.)

would send money over to me by Jung Kim the next day and I was to send Bernard twenty-five dollars for each of the Chinamen in San Diego to bribe the jail officials there to let them go. He said there was approximately two hundred Chinese in Mexico that were willing to come to the United States, and that I could make twelve or fifteen thousand dollars a year by allowing them to come in, and that I would lose that and he would lose a lot of money too.

About 2:30 o'clock in the afternoon of September the 27th, 1911, Jung Kim came over to my room. At that time I stationed Mr. W. J. Weems in the closet of my room and took off the lock so that he could see through the hole where the door knob goes through and left the door about a fraction of an inch open so that he could hear the conversation. Jung Kim came in and said that Sam Yick had gone to San Francisco to see these men whose names had been furnished him in these letters from Ensenada, and that he had sent over the money by them, that he had got only twenty dollars apiece instead of twenty-five and Jung Kim handed over the money to me, three twenty dollars gold pieces, one was dated 1901, the other 1904, the other 1905. I wrote a receipt on the typewriter and made a carbon copy of it. The money was to be sent to Inspector Bernard with instructions to give it to any of the jail officials who were in a position to release the three Chinamen in jail there.

(Witness here produces three twenty dollar gold pieces.)

When Jung Kim gave me this money I placed it on

(Testimony of Edward P. Morse.)

a table in plain sight where Mr. Weems could see it. As soon as Jung Kim left I took the money and marked it with a triangle right under the neck of the Goddess of Liberty, between that and the date. Mr. Weems marked them with a different mark on the [73] reverse side. The mark is still visible there and Mr. Weems witnessed the receipt that I gave for the money after Jung Kim had gone.

(Witness examining paper.) Yes, this is the carbon copy of the receipt. I signed it while it was between the papers.

(Copy of receipt received in evidence as United States Exhibit No. 5 and read to the jury and is as follows:)

**[United States Exhibit No. 5—Receipt Dated
Bakersfield, September 27, 1911, E. P. Morse to
Sam Yick.]**

DEPARTMENT OF COMMERCE AND LABOR.

Bakersfield, Cal., Sept. 27, 1911.

Received from Sam Yick, \$60.00, this money to be sent to Inspector Bernard at San Diego, Cal., for the purpose of obtaining the release of the three Chinese now under arrest there and for their return to Mexico, or if this is not possible, it is understood that the money is to be returned to Sam Yick. This money was delivered by Chang Kim.

E. P. MORSE.

W. J. WEEMS,

Witness.

(Testimony of Edward P. Morse.)

(Stamped across top of paper with rubber stamp as follows:)

“U. S. Immigration Service,
Commerce and Labor.
Received
Sept. 28, 1911.
Port of Los Angeles.”

Three twenty dollar gold pieces filed in evidence as United States Exhibit No. 6 and shown to the jury.

(Witness continuing.) Jung Kim said that Sam Yick had sent the money over for the purpose of releasing the three Chinamen from jail. I asked him if these were the three Chinamen that he had brought over, and he said yes.

A few days later, about the thirtieth of September, I saw Sam Yick. He told me that he had been to San Francisco and that the men in San Francisco were afraid to go in with him under the present conditions, that if the three Chinese in jail were released and sent to Mexico or brought to Bakersfield, they would finance them to any extent, but if the Chinese were sent to China, he (Sam Yick) was afraid that they would be too suspicious to put up any financial backing, Sam Yick said that [74] if we could get these Chinese out and bring them to Bakersfield everything would be all right. That he could get any number of Chinese to come. He said there was lots of them there, that he thought he could bring a batch of five or six every week, that he would get them as fast as he could bring them, that he was going to have Jung Kim go to San Diego and bring

(Testimony of Edward P. Morse.)

them up [75] to Los Angeles to put them on the right train there and wire him to meet the train when it got to Bakersfield, so that Jung Kim could return immediately to San Diego and get another batch. He asked me if I hadn't fixed up the papers yet, and he said he wanted most of the Chinamen to remain in Bakersfield, that I knew they were all right and they wouldn't be troubled there. He asked me to see if I couldn't do anything to see that these Chinamen were released and were not sent to China.

About a week later I saw Sam Yick again. He told me the Chinese had not been released and that he understood they were going to China, and asked me if Inspector Bernard had done anything with the money. After that I saw him off, and on every few days, when I saw him he would ask me what I had heard or what Bernard had heard or what action was being taken about these Chinamen, and I told him that it had been arranged through the efforts of myself and Inspector Bernard to have them remain there and that eventually they would be gotten out, but that we kept them from being deported, and that he would have to give us time to get them out of jail. One day after that I met Sam Yick and Jung Kim on the street, and Sam Yick asked me about the most economical way to travel, asked me if Jung Kim would not save money by buying a scrip or mileage book, that he was going to be on the road back and forth all the time.

The next conversation I had with Sam Yick was

(Testimony of Edward P. Morse.)

just before his arrest. He told me to let him know immediately if there was any chance of these Chinamen being released at any certain time so that he could send Jung Kim down after them.

Cross-examination by Mr. DOCKWEILER.

I am thirty-four years old, have lived in California about three years and a half. Before entering the Government service I was reporter for Bradstreets Mercantile Agency in Philadelphia. [76] I joined the Government service as a Chinese inspector February the 28th, 1910, and I have been an immigrant inspector for the Government service about three years and have been working in California about three years and a half. I went to Bakersfield about the first of January, 1911, my duties there in Bakersfield were to inspect trains and arrest Chinese that would pass through without papers and to make investigations generally of Chinese around Bakersfield to see that they were entitled to be and remain in this country. There was no other inspector located at Bakersfield while I was there for the first six months of 1911. I left Bakersfield about the latter part of April, 1912.

I first became acquainted with Sam Yick, the defendant, about a month after I went to Bakersfield, I got acquainted with him in the course of my general investigations. He never called at my office or sought my acquaintance. At the time I went there Sam Yick was one of the most prominent merchants in new China Town, Bakersfield. I called on Sam

(Testimony of Edward P. Morse.)

Yick possibly a dozen or fifteen times in connection with Chinese immigration matters before any mention was made of smuggling contraband Chinese, and he knew that I was an immigration official. On some of these occasions I took Chinese to Sam Yick's store to examine their papers, some of the Chinese kept their papers there, at other times I went there looking for Chinese supposed to be around town to find out where they were located; and in one or two instances Sam Yick acted as interpreter for me in Chinese investigations; when he acted as interpreter for me it was at the request of the Chinese and I consented because I considered it was the best I could do. I would go to the fields and ranches near Bakersfield and whenever I found a young Chinaman that I suspected of being a contraband I took him to wherever he said his papers were, if any Chinaman didn't have their papers I would take them away from their work and make them accompany me to town or wherever they [77] said their papers were to show them to me. The only occasion on which any discussion or controversy arose between myself and Sam Yick regarding Chinese, was one occasion when a number of Chinese were leaving Bakersfield to go to Wasco, about twelve or fifteen Chinese came to the Santa Fe Station and none of them had any papers with the exception of one or two, they said they were going out of Bakersfield to work at this garden at Wasco, and Sam Yick had bought the tickets at the depot and put them on the train. The greater part

(Testimony of Edward P. Morse.)

of these Chinese said that their papers were in Sam Yick's store. At first I would not agree to let them go without showing their papers, but eventually after having seen their tickets, and when Sam Yick told me their papers were with him, I allowed them to go. I afterwards went to Sam Yick's store and saw the papers there. At the time I let these Chinese go I took Sam Yick's word in conjunction with the others and circumstances in general that all these Chinese were entitled to remain in the country. About a week later I investigated the matter further and on going to Wasco found perhaps seven or eight of these Chinamen working in a garden there. I examined their certificates and they were all right, the rest of the Chinamen had gone away. I don't remember any party of forty Chinamen or any considerable number coming to Bakersfield about which a dispute arose between myself and Sam Yick at any time. I do remember one occasion when I took some Chinese to Sam Yick's store, and when they produced their papers there I took up one of the papers and sent it to Los Angeles which didn't meet with the approbation of those in the store, I don't remember whether Sam Yick protested particularly against that. My impression is that this occurred in the spring of 1911.

I went to Sam Yick's store quite a number of times before anything was mentioned about getting in contraband Chinese from Mexico or elsewhere, but I was never particularly friendly with [78] Sam Yick, I found out who Sam Yick's wife was

(Testimony of Edward P. Morse.)

but I don't remember whether he ever introduced her to me, I never developed any familiarity in a social way with Sam Yick, but when I went to his store I went there on business matters and treated him with business courtesy in a business way; I never attempted to gain Sam Yick's confidence before mention was made of smuggling Chinese. Sam Yick impressed me as a man of ordinarily good intelligence, with a good knowledge of English, he was known locally as King of new China Town and I probably referred to him in that way in my official correspondence.

I had known Sam Yick probably four or five months before the question of smuggling Chinese in from Mexico was mentioned. He was the first person to talk to me on the subject and he suggested the matter to me. At the time I entered the Government service February the 28th, 1910, I took an oath of office and swore to support the constitution of the United States and uphold its laws and to demean myself properly as an immigration officer. At the time Sam Yick first suggested the matter of smuggling Chinese to me I was surprised but I showed no resentment and made no objection to the suggestion.

Q. (By Mr. DOCKWEILER.) * * * Now, when he mentioned the subject of your making some money on the side by violating the law by way of inducing Chinamen to come into the United States or permit them to illegally remain in, you apparently indulged in no resentment, did you?

(Testimony of Edward P. Morse.)

A. No, sir.

Q. Well, you made no objection to the suggestion?

A. No, sir.

Q. On the contrary at that conversation and at all subsequent conversations with Sam Yick that occurred according to your testimony, you encouraged him, did you not?

A. I don't say that I encouraged him, no. [79]

Q. Well, you assisted him?

A. I agreed to go in with him.

Q. You agreed to go in with him?

A. Why, I agreed to the proposition as made by him, I should say * * *

Q. (By Mr. DOCKWEILER.) Then did you make the suggestion to Sam Yick of using certain slips, the four slips that have been introduced in evidence here?

A. I did, after he decided not to use the photographs for identification purposes. It was his idea originally to use photographs for identification purposes.

Q. Who prepared the slips?

A. I don't know who prepared them. Sam Yick brought them to my house.

I introduced Bernard, the inspector at San Diego, to Sam Yick, that was on August the 24th, 1911. Sam Yick took us to a back room in his store. He asked me if that was the inspector from San Diego that was going to co-operate with us. I said, yes, and he then called in Jung Kim and introduced Jung Kim to Inspector Bernard as the man who was to

(Testimony of Edward P. Morse.)

act as guide for any contraband Chinese brought in. I don't remember anything being said at that time about the fact that Jung Kim had never before in his life been in San Diego or the country adjacent thereto, and I never found out later that this was a fact. I had known Jung Kim prior to my meeting him on this occasion. I knew him as one of the partners in Sam Yick's store. At this meeting on August the 24th, 1911, between Bernard, Sam Yick, Jung Kim and myself, it was arranged that Jung Kim was to go to San Diego as soon as he got word that the Chinese would leave Ensenada for Tia Juana, and he was to remain in San Diego until he got in touch with the Chinese in Tia Juana over the telephone and found out when they would be ready to come, then Jung Kim was to go to Tia Juana and [80] get the Chinese and bring them over to San Diego and leave them at the store of Hop Woo Lung there at 339 Second Street there. The Chinese were to remain there several days to get rested and cleaned up, and then Jung Kim was to take them on the train and bring them to Bakersfield. At that conversation Jung Kim asked Bernard what his telephone number was and he and Sam Yick made a note of this telephone number, and asked if it would be advisable to call him (Bernard) at the immigration office, and Jung Kim said that he would let him know shortly after he reached San Diego. I am positive that no suggestion was made by Bernard or myself about the matter of the telephone number, or Jung Kim reporting to Bernard on ar-

(Testimony of Edward P. Morse.)

rival in San Diego. I don't think that Jung Kim was told by any one that there was a telephone between San Diego and Tia Juana. The plan of telephoning was suggested either by Jung Kim or Sam Yick, I am not certain which. I am certain I didn't suggest it, and to the best of my recollection Inspector Bernard didn't. Sam Yick then asked Bernard which was the best way of getting from San Diego to Tia Juana, down the railroad or down the traveled road, and Inspector Bernard told him that the railroad was shorter, would probably make it quicker but would be rougher traveling; Sam Yick then asked Bernard how many soldiers there were in Tia Juana and how many officers there were in the custom house there and Bernard informed him that there were not as many as there had been. Sam Yick also asked Bernard which was the best road from Ensenada to Tia Juana or from Tia Juana to San Diego, and Bernard told him that it was immaterial, that all the roads led to San Diego.

No suggestion or arrangement was made at this conference of August 24th, 1911, that as soon as Jung Kim arrived in San Diego, Bernard was to take him or have some other person take him and show him the boundary line, and no suggestion was made that upon Jung Kim's arrival in San Diego, he was to be taken over [81] the territory and shown how the Chinamen could be gotten over. It was arranged, however, that Jung Kim would call up Bernard and let him know that he was in town, but otherwise no inference drawn from any conversa-

(Testimony of Edward P. Morse.)

tion at that time that Bernard was to go, with Jung Kim to show him where to go by what route or anything of that sort, but Jung Kim indicated at this conference that he would be able to take care of himself when he got down to San Diego, that he would go and get a room and stay there, and that he knew the railroad went to Tia Juana and that he could go down on the railroad. I suggested to Sam Yick in the first instance that Bernard should come to Bakersfield and meet Jung Kim. I made the suggestion because Sam Yick asked me if I could get another inspector to go in with him.

On September the 8th, 1911, the day Jung Kim left Bakersfield, I was present at the depot for the purpose of inspecting the northbound train and also of seeing Jung Kim off on the southbound train; I was in the station when Jung Kim bought his ticket, but I didn't help him buy it, I asked him if he had his ticket, he brought it out and showed it to me, if Sam Yick was at the station at that time I didn't see him. The next time I heard from Jung Kim after his departure from Bakersfield on the 8th of September, was on the 20th of September, when he came back to Bakersfield; between September the 8th and September the 20th, I saw Sam Yick two or three times. I didn't know of my own personal knowledge who wrote the telegram that was sent by Jung Kim from San Diego to Sam Yick, I remember seeing Jung Kim write a telephone number down that Mr. Bernard gave to him, but I don't know and cannot state positively whether or not Jung Kim

(Testimony of Edward P. Morse.)

can write the English language or any number of words in it.

When I saw Jung Kim upon his return to Bakersfield I asked him what kind of an experience he had had on the trip. He told [82] me that he had gone to Tia Juana, had got the three Chinese and had walked across the line on the railroad with the Chinese following him, that he had proceeded up the railroad for some distance until he missed the Chinese and on going back to look for them he could not find them, that these Chinese had been hunted for all that night but they were unable to find them, that then he went back to San Diego; that the Chinese had been arrested by the police in San Diego and were held by them and were in jail in San Diego at that time, that he had been informed by friends that the probability was that they would get out of jail after a short time and be returned to Mexico, and he supposed if that was the case that Sam Yick would want him to go down again and try to bring them to Bakersfield as was originally intended; I remarked to Jung Kim at that time that it was pretty tough luck to be gone down there that long and have a trip like that and not get anything out of it.

I don't know whether Sam Yick or Jung Kim ever left Bakersfield from the time of my first conversation with Sam Yick about smuggling Chinese until the return of Jung Kim from Bakersfield. I don't know if, when Sam Yick first suggested to me that I could make some money on the side by smuggling

(Testimony of Edward P. Morse.)

Chinese, I had told him he was doing wrong in asking me to join him in committing a crime whether or not Sam Yick would have persisted; I don't know whether or not if at that time I had told Sam Yick that his proposal was a violation of the law and that I couldn't participate in it and that he must not talk to me about it, whether he would have continued or not.

Q. (By Mr. DOCKWEILER.) Now, is it not a fact that from the very first conversation that you had with Sam Yick you encouraged him to pursue the proposition of bringing contraband Chinese into the country? A. No, sir, that is not a fact. [83]

Q. Is it not a fact that you aided him and made suggestions from time to time to him or to Jung Kim with a view of getting him to continue in developing the idea and proceeding on his, as you claim, proposed course of bringing Chinese into the country?

A. No, sir, I didn't aid him in any way.

I made suggestions but not with the purpose that you mention, the suggestions I made were for the purpose of being able to produce evidence later on of what I am testifying about, not to aid him in his work.

The original price suggested for the papers from Juarez was one hundred and fifty dollars for every Chinaman from Tia Juana the price was about two hundred and fifty dollars. The price was raised because Sam Yick spoke of having another inspector in on the proposition and that he would have to have

(Testimony of Edward P. Morse.)

his out of it. The matter of having another inspector in on the proposition was Sam Yick's suggestion in the first place. He asked me if I couldn't secure a confederate in San Diego. I told him I would see what I could do and subsequently told him that I could and introduced Bernard to him. During all of the course of my negotiations with Sam Yick I did nothing to encourage him in any way that I know of, though I never reproved him for anything that he said or proposed. I thought Sam Yick was suspicious, I don't think he placed unbounded confidence in me, if he had done so, he would hardly have made threats against my life in case I gave information regarding him. I have never been injured that I know of but an attempt was made to injure me, approximately a month after Sam Yick's arrest, I was shot at right in the vicinity of China Town. I went down into China Town immediately after that and visited China Town subsequently. I didn't know who shot at me, I didn't see the man, I did hear the whiz of the bullet. There was only one shot fired and that [84] was from behind. I turned around and fired a couple of shots myself. Shortly after I was shot at again in the same vicinity within a square and a half of China Town. I don't know who did the shooting. None of these shots ever took effect. There was no one with me on either of these occasions when I was shot at, and no member of my family has ever been injured since then; notwithstanding these two occasions on which I was shot at I continued to visit

(Testimony of Edward P. Morse.)

China Town. I was transferred from Bakersfield on the latter part of March or the first of April, 1912. Sam Yick was arrested there in October or November, 1911. He ceased talking to me about the case from the time he was arrested. The matter of getting a guide to bring the Chinese over was first suggested either at the meeting of May the 8th or May the 17th or August the 10th, I told Sam Yick that I would have nothing to do with bringing the Chinese across, he said that was not necessary, that he would send a guide down to attend to that part of it. The guide was to bring the Chinese across from Mexico, buy their tickets, and look out for them generally until such time as they reached Bakersfield, and Jung Kim's name was suggested as a guide. To the best of my recollection I have stated everything that occurred in connection with this case between myself and Sam Yick subsequent to August the 24th, 1911.

(It was here stipulated between counsel for the Government and counsel for the defendants, that witness, Edward P. Morse, might be recalled later on for further cross-examination on one matter.)

Redirect Examination by Mr. STONE.

One inducement Sam Yick offered me to go into this proposition was that the money would be made by some one, that I might as well get it, that if I didn't take the two hundred and fifty dollars for these Chinese that were brought in, some one else would get it, and I might as well have it as [85] someone else.

As immigration inspector at Bakersfield I was

(Testimony of Edward P. Morse.)

both required to and did keep a record of Chinese that I inspected at the trains. I have that record with me. It does not show any record of forty Chinese arriving on or about or near April the 1st, 1911.

Q. After May 8th what did you do after this first conversation with Sam Yick, what was your next step, that is on the 9th and 10th with reference to this matter?

A. On the morning of the 9th I proceeded to Los Angeles.

Q. And where did you go?

Q. (By Mr. DOCKWEILER.) Was the defendant present? Were any of the defendants present?

A. No, sir.

Q. At the point to which you repaired?

A. Not to my knowledge.

Mr. DOCKWEILER.—Then we object to the statement by this witness of anything that he said or did in the absence of either of the defendants or of the defendants.

(Here discussion was had between Court and counsel as to the admissibility of this line of testimony.)

Mr. DOCKWEILER.—And we object to the question further on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. DOCKWEILER.—Exception.

A. On the following morning of the 10th I reported at the immigration office in Los Angeles.

(Testimony of Edward P. Morse.)

Q. (By Mr. STONE.) Who did you report to?

A. The inspector in charge, Mr. Connell.

Q. On the morning of what?

A. On the morning of the 10th of May, 1911.

Q. And did you receive any instructions from him?

Mr. DOCKWEILER.—Same objection. [86]

The COURT.—Same ruling.

Mr. DOCKWEILER.—Exception.

A. I did, I talked over the whole proposition with him and we went into the matter quite thoroughly. I received instructions to apparently entertain any proposition that came along and report matters immediately; to take the initiative in no instance, but to act in a receptive mood and entertain anything that was put up to me.

Mr. DOCKWEILER.—Is your answer finished?

The WITNESS.—Yes.

Mr. DOCKWEILER.—Now, I move to strike out the answer of the witness, your Honor, on the ground that it is incompetent, irrelevant and immaterial; that the statement he has just made was made by somebody else, this Mr. Connell, to this witness, and by this witness to Mr. Connell in the absence and without the hearing of the defendants and each of them.

The COURT.—The motion is denied.

Mr. DOCKWEILER.—Exception.

Q. (By Mr. STONE.) On the 10th when you had a conference with Mr. Connell was there anything said to you by Mr. Connell in regard to putting in

(Testimony of Edward P. Morse.)

writing your report?

Mr. DOCKWEILER.—Same objection.

The COURT.—Same ruling.

Mr. DOCKWEILER.—Exception.

A. Yes, sir, I was told to make a full report of the matter and turn it in to him.

Q. Did you make that report on that date?

A. I did.

Mr. DOCKWEILER.—Same objection.

The COURT.—Same ruling.

Mr. DOCKWEILER.—Same exception.

A. I might further state at that time that Mr. Connell [87] informed me that later on I would very likely receive further instructions in the matter as the plan proceeded—developed.

Mr. DOCKWEILER.—We move to strike that answer out.

The COURT.—Motion denied. We might have an objection to this line of testimony.

Mr. DOCKWEILER.—It is understood—

Mr. STONE.—Yes, it is stipulated.

Mr. DOCKWEILER.—That the defendants and each of them has an exception to all this line of testimony.

The COURT.—Yes.

Mr. DOCKWEILER.—Based on the grounds already urged.

(Witness continuing.) There had been no inspector stationed at Bakersfield prior to my going there. It was Sam Yick who suggested the guide, Jung Kim, to bring the Chinese over. With reference to

(Testimony of Edward P. Morse.)

the telegram that Sam Yick showed me in Bakersfield, I wrote a copy from memory after Sam Yick had left me. I have that copy; the first eight or ten words of the telegram were written in Chinese followed by the words: "I come back tomorrow" signed "Jang Chong."

Q. (By Mr. STONE.) (Showing witness paper.) I wish you would examine that and state whether or not to your best recollection that is a copy of the same words?

A. That is identically the same telegram he showed me, the wording.

Q. Mr. Morse do you know who suggested Mr. Bernard to come over to Bakersfield?

A. I do.

Q. Who was it?

A. Mr. Connell, inspector in charge at Los Angeles.

Q. And from the 10th of May on until all through this matter did you have correspondence with the inspector in charge here? [88]

A. I did.

Q. Did you report what was being done at all times?

Mr. DOCKWEILER.—Of course this is all under the stipulation?

Mr. STONE.—Yes.

A. I reported every action as it took place at the time or very shortly after, immediately, as soon as I could report everything that took place.

The COURT.—You mean by everything that took

(Testimony of Edward P. Morse.)

place the matters to which you testified on the stand here? A. Yes, sir.

Q. (By Mr. STONE.) And have you examined this file of letters which was in Mr. Connell's possession in making those reports? A. I have.

Q. And are these the letters you wrote and that show to be signed by you?

A. All these signed by me are written by me.

(Here the telegram shows the witness was produced by Mr. Stone and marked Government's Exhibit No. 7, for identification.)

Recross-examination.

(By Mr. DOCKWEILER.)

Q. Now, Mr. Morse, did you or did you not on May the 18th, 1911, in a letter transmitted by you to the inspector in charge of the immigration service at Los Angeles, California, make use of and write the following?

(Mr. DOCKWEILER (Reading to witness.) "I told him (him referring to Sam Yick) I thought it would be a good idea [89] to have the inspector in San Diego who is to pass the Chinese there, come to Bakersfield and meet the man from here who is to act as guide, so that they would know each other, etcetera, to which he agreed."

A. Yes, sir. I think I wrote that.

(Witness continuing.) I wrote that because it was suggested by Sam Yick that I go to San Diego to talk to the inspector there. I made the suggestion that he come to Bakersfield instead. I don't know whether or not I ever reported this suggestion of

(Testimony of Edward P. Morse.)

Sam Yick's to Mr. Connell.

Q. Well, from this statement that I have just read it is evident therefrom that you were the man, is it not, who suggested that the San Diego inspector come up there?

A. Yes, sir, I made the suggestion that he come to Bakersfield instead of my going to San Diego.

(Witness Continuing.) I couldn't be positive one way or the other whether I ever made a written report to Mr. Connell or any other superior officer respecting the suggestion made by Sam Yick that I should go down to San Diego and talk to the inspector there. I have all of the correspondence that I addressed to my superior officer, it is accessible to me and has been all through this trial, but I have not read it all over.

(Here the Court instructed the witness to devote whatever time was necessary to going over the correspondence so as to be able to answer the questions of the counsel.)

(Witness continuing.) I did make a suggestion to Sam Yick as to the methods to be pursued, and I made several suggestions of various kinds acting under the orders of my superior officer. I never made any suggestion to Sam Yick as to how to get the Chinamen across the line.

Q. Well, what other things do you remember now that you kind of helped him out on in order to develop the scheme? [90]

A. Well, one of them was to use the marked card or paper system instead of photographs; and he

(Testimony of Edward P. Morse.)

claimed that he did not want to let the photographs go as identification cards, to use marked cards instead. Another such thing was, he told me that when this money was to be paid to me, it would be paid sometimes at his store and sometimes he would come to my house and pay it, and acting under the instructions, I made the suggestion that he pay me at the S. P. Depot when this batch of three was brought up, pay the money there, so that it would not be necessary for me to go to Chinatown. In explanation of that I will say that would give the Chinese a chance to get away and we wouldn't be able to catch them possibly; also if he paid the money to me in Chinatown, in his store, there would be no possibility of my having any witness to that transaction; whereas, if he paid it at the S. P. Depot, there would be. Those are three suggestions that I remember.

Q. And any others?

A. That is all that I think of now.

Q. Did you also on May 18, 1911, write to the Immigration Inspector at Los Angeles the following: "I told him (referring to Sam Yick) we could arrange to have all the inspectors off the railroad, so that they could come through just the same (they referring to Chinamen) even if I could not get the papers now, outlining the marked card system as you suggested, and he thought that would be all right, and then they could put in an application for native born papers afterwards." Did you write that?

A. I did.

Q. Did you also at the same time write to the im-

(Testimony of Edward P. Morse.)

migration inspector at Los Angeles the following: "I would suggest that, if satisfactory to you, Inspector Keep be notified what is developing and that we both receive personal introduction from you together."— [91]

The WITNESS.—"Instructions."

Q. (By Mr. DOCKWEILER.) "Instructions from you together as there is considerable detail I would like to talk over."

A. I also wrote that.

Q. Did you also write this at the same time: "In any case, I would like to know at once who will be detailed on the case, at San Diego, as Sam Yick is liable at any time to ask the name of my assistant"?

A. I wrote that also.

(Witness continuing.) I don't think anything of importance in connection with any transaction I had with Sam Yick subsequent to August 24th, 1911, has slipped my mind.

Redirect Examination.

(By Mr. STONE.)

(Witness continuing.) I never got any money from defendants in this case except the \$60.00 that has been offered in evidence.

Q. And what were your purposes in making the suggestion that you said you did make, Mr. Morse?

A. In reference to which suggestion was that?

Q. Oh, that Mr. Dockweiler asked you about, that you said you made as indicated in the letter.

Mr. DOCKWEILER.—Well, now, we object to

(Testimony of Edward P. Morse.)

that as irrelevant, incompetent and immaterial, the purpose of it.

The COURT.—Objection overruled.

Q. What were your purposes in making these suggestions?

A. Well, one of my purposes was to follow out the instructions that I had.

Mr. DOCKWEILER.—The ruling of the court will be the same on that, and exception.

A. The purpose of having the marked cards was to have something to connect the Chinese in case they came with the deal [92] as proposed in Bakersfield; as I explained the suggestion about paying over the money was for the purpose of having a witness to the transaction.

Recross-examination.

(By Mr. DOCKWEILER.)

(Witness.) I never received any money from Sam Yick or anybody or Jung Kim or anybody else in connection with this case other than the sixty dollars I have testified to and which has been introduced in evidence here. If I had received any such money I most certainly would remember it.

Q. (By a Juror.) I would like the permission of the Court to ask the witness one question.

The COURT.—Very well.

The JUROR.—Did you read the receipt you gave to Jung Kim to him or did you give it to him?

A. No, sir, I read it to him out loud. Can I explain why?

(Testimony of Edward P. Morse.)

The COURT.—Yes.

Mr. STONE.—Yes.

A. The express purpose—

Mr. DOCKWEILER.—We object to the statement of the witness; it is incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. DOCKWEILER.—Exception.

A. I read it out loud to him for the express purpose of Mr. Weems who was in the closet, to hear what the receipt was, to be able to identify the duplicate which I wrote at the same time with a carbon paper on the typewriter.

Recross-examination by Mr. DOCKWEILER.

I prepared and wrote myself on the typewriter the receipt for sixty dollars that I gave Jung Kim and Jung Kim brought me sixty dollars and then I gave him the receipt. [93]

[Testimony of W. E. Giddings, for the Government.]

W. E. GIDDINGS, a witness called on behalf of the Government, having first been duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is William E. Giddings; I live at Bakersfield, California; I have lived there a little over three years; my business is that of a machinist. I have known Mr. E. P. Morse, the gentleman who has just left the witness-stand, about three years. I am not in any manner connected with the Government service. I know the defendant, Sam Yick, by sight, that

(Testimony of W. E. Giddings.)

is all. I am not so sure about the other defendant, Jung Kim, the peculiarity about his right hand is the only thing I remember of him. During the month of April and during the spring and the summer of 1911, Mr. Morse roomed at my house. I have seen Sam Yick and Mr. Morse together in Mr. Morse's room at my house. I made memorandums at the times I saw him there and I have it with me. The first time I saw them together was on May the 17th, at my house; I saw them through an open window with the shade up; it was in the evening; I could hear a few words that were said but I don't remember anything that was said then. I made a mistake in the date that I saw Sam Yick at the house; May the 17th was the time when I went to the store with Mr. Morse; August the 25th and September the 4th and 5th were the only times I saw him at the house. August the 25th was the first time he came to the house when I saw him, that was the time I saw him through the window.

On May the 17th I went to Eighteenth Street to Sam Yick's place of business, with Mr. Morse. I saw Mr. Morse go into Sam Yick's store, and I went to Nineteenth Street and waited for him. Mr. Morse was in the store about an hour. The next time I saw Sam Yick and Morse together after August the 25th was on September the 4th and 5th. I saw them only once in the [94] room. I saw Sam Yick come to the house twice after that. On September the 4th, about eight o'clock in the evening, I saw him again in the room in the same way. On September the 5th,

(Testimony of W. E. Giddings.)

I saw Sam Yick come to the house, but I didn't see him in the room.

Mr. DOCKWEILER.—No cross-examination.

[Testimony of Edna M. Giddings, for the Government.]

EDNA M. GIDDINGS, a witness called on behalf of the Government, having first been duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is Edna M. Giddings; I live at Bakersfield; I am the wife of William E. Giddings; I know the defendant Sam Yick; I have known him about two years and a half; I have known Jung Kim about the same length of time. Mr. Morse roomed at my house in 1911. I saw Sam Yick visit my house while Mr. Morse was there, ten or fifteen times. Mr. Morse was not in the house at all the times that Sam Yick came. On one occasion Sam Yick came and I was in the back part of the house, and he was already in Mr. Morse's room when I discovered that he was there. I heard some one in the room and I peered into the room from another door and said "Good morning," and asked him if he wanted to see Mr. Morse; he said "Yes"; I told him he was not at home; he asked me where he was, and I said he was out of town, and he wanted to know again if I was sure he was not here, and I said, "Yes." Mr. Morse's bed was unmade; I had used it the night before for some of my family. Sam Yick said, "Well, he sleep in his bed last night"; I said that did not make any difference, that he was not there; that

(Testimony of Edna M. Giddings.)

ended our conversation and Sam Yick went away. I didn't keep any dates of these times, but I think it was some time during the summer, some time after August the 8th; I think it was after August the 8th, because Mr. Morse came back from his vacation on that date. On another occasion [95] after that Sam Yick came to the house when I was in the back yard; he asked for Mr. Morse again. I said he was not there, and Sam Yick asked me if I was Mr. Morse's wife; I said "No," and he went away.

Mr. DOCKWEILER.—No cross-examination.

[Testimony of W. J. Weems, for the Government.]

W. J. WEEMS, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is W. J. Weems; I live at Bakersfield; have lived there for nine or ten years. My business is real estate and collections. I have known Sam Yick for about the length of time I have lived in Bakersfield. I have known Jung Kim three or four years. I know Mr. Morse and was acquainted with him in 1911 when he was in Bakersfield.

On the 27th day of September, 1911, I went with Mr. Morse to Mr. Giddings' house, 1515 Baker Street, where Mr. Morse was staying; it was between one and two o'clock in the afternoon when we arrived in the house. I secreted myself in a closet in Mr. Morse's room. Before I went in the closet we took the lock off the door. While I was in the closet in Mr. Morse's room, the defendant, Jung Kim, came

(Testimony of W. J. Weems.)

in alone. Jung Kim told Mr. Morse that he came to see him for Sam Yick and brought him some money in order to get some Chinese out of jail in San Diego. He paid Mr. Morse sixty dollars in three twenty dollar gold pieces; Mr. Morse wrote a receipt for this money in Jung Kim's presence and gave it to him; the receipt was read while I was in the closet; I could hear it distinctly. I am not in the employ of the Government in any way, and I accompanied Mr. Morse on this occasion at his suggestion.

Cross-examination by Mr. DOCKWEILER.

The closet I refer to was about three feet [96] wide. I remained in there ten or fifteen minutes probably; the door of the closet was closed and the only opening was where the door knob went through; the closet was dark, the only light coming into it was through the door knob hole; the door knob hole was a round hole about an inch wide. I had a chair in the closet, on which I sat down. I looked through this hole in the closet door to see what was going on. I could see all over the room. The closet was in about the middle of one of the walls of the room.

[Testimony of R. R. Jackson, for the Government.]

R. R. JACKSON, called as a witness on behalf of the Government, was first duly sworn, and testified as follows:

Direct Examination by Mr. STONE.

My name is R. R. Jackson; I live at Bakersfield; I am in the Passenger Department of the Southern Pacific Railroad; I have been ticket agent for this

(Testimony of R. R. Jackson.)

railroad, at Bakersfield, about four years. I know the defendant, Jung Kim, by sight; I recollect the occasion of his purchasing a ticket at my station in September, 1911; I have the stub of the ticket with me (witness produces stub). This is the stub of the ticket I sold Jung Kim; it shows the date, September the 8th, 1911. The ticket read from Bakersfield to San Diego.

Mr. DOCKWEILER.—No cross-examination.

[Testimony of A. G. Bernard, for the Government.]

A. G. BERNARD, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is A. G. Bernard; I am now immigration inspector at Bakersfield; I have lived at Bakersfield since April the 22d, 1912; I have been an immigration inspector since February 11th, 1907. I will have to refresh my memory by looking at my memorandum-book to find out when I got acquainted with the defendants Sam [97] Yick and Jung Kim; this memorandum was made at the time shortly after I got acquainted with them. On reference to my memorandum-book I find that on August the 24th, 1911, was the date I first became acquainted with Sam Yick and Jung Kim; at that time and prior to that time I was stationed as an immigration inspector at Tia Juana, San Diego and Del Sur, California. On August the 24th, 1911, I went to Bakersfield under the direction of my superior officer in this district,

(Testimony of A. G. Bernard.)
inspector in charge, Connell.

Q. And prior to going there had you had a conference with Mr. Connell here as to your visit over there?

Mr. DOCKWEILER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—What is it you want to show?

Mr. STONE.—It is simply corroboration, and to show that he acted under the instructions of a superior officer; the same principle that we discussed before.

The COURT.—The objection is overruled.

Mr. DOCKWEILER.—It is stipulated, your Honor, that we make the same objection to this line of questions as we did in the case of Mr. Morse, and have the same ruling and same exception?

The COURT.—Yes.

A. I was ordered to go there by inspector in charge Connell.

Q. In receiving the orders did you have any conference with Mr. Connell as to the purpose of your visit?

A. I had a conference with the District Attorney and with Mr. Connell.

Q. Whereabouts?

A. In the District Attorney's office.

Q. In Los Angeles? A. Yes, sir.

Q. You mean the United States District Attorney? [98]

A. Assistant District Attorney Frank Stewart.

Q. Who was present at that conference?

(Testimony of A. G. Bernard.)

A. Inspector Connell, Assisted District Attorney Stewart and Inspector Morse.

Q. E. P. Morse, the man who has just testified?

A. He was here—

Q. What was that conference, where Mr. Stewart, the Assistant United States Attorney, and these other parties were present, about? You need not state what was said, but what was it about?

Mr. DOCKWEILER.—Of course, this is a new man introduced; we have the same objection and the same ruling and exception.

The COURT.—Yes.

A. Why, I was informed that Mr. Morse was approached for a smuggling game, and—

Mr. DOCKWEILER,—Now,—

The COURT.—The difficulty about those matters is that testimony gets into the record that ought not to be permitted.

Q. (By Mr. STONE) Can you state what the conversation was about, without stating the conversation?

A. Smuggling Chinamen.

Q. Whereabouts?

A. Bakersfield, Tia Juana, and San Diego.

The COURT.—The main thing you want to show is that he acted under instructions of his superiors?

Mr. STONE.—Yes, your Honor. I will withdraw the further question.

Q. Did you receive any instructions there from Mr. Connell in the presence of the Assistant United States Attorney in reference to what you were to do?

(Testimony of A. G. Bernard.)

You need not state what was said but did you receive such instructions?

A. Why, nothing only that I should take a hand in it and [99] not take any lead, but to listen and follow up what went on.

Q. What was the date of that conference?

A. It is in the book there. He (Mr. Dockweiler) has got the book.

(Memorandum-book handed to witness.)

A. What was the question?

Q. (By Mr. STONE.) The date of the conference here in the office of the United States Attorney.

A. May 24, 1911.

Q. Then after that, when you went to Bakersfield, on August 24, 1911, was that the first time you went after this conference?

A. That is the first time, yes.

(Witness continuing.) After I arrived at Bakersfield on August the 24th, 1911, I went to the post-office and the jail, talked to the ticket agent and a few people, and then about noon I met Inspector E. P. Morse and stayed with him all the rest of the day. About eight o'clock that evening I went with Mr. Morse to Sam Yick's store, Morse introduced me to Sam Yick and then Sam Yick and Morse and I went into a back room in the rear of the store. Before Jung Kim came into the room Morse introduced me to Sam Yick as the man working at San Diego that was going to help him out in the smuggling deal, and there was some conversation, the substance of which was that we were to get two hundred and fifty

(Testimony of A. G. Bernard.)

dollars for smuggling four Chinamen from Tia Juana to Bakersfield; we had some conversation as to the best way to get them through, the best way to get them from Ensenada, and I said, "Well, if you are going to get them to San Diego, better get them from Tia Juana. That is the better way to do." Sam Yick said, "Well, then, from there." I says, "Well, the most popular route seems to be the railroad, all roads lead to San Diego, and you can have your choice of routes; it [100] is all the same." I told him I thought the railroad was the shortest route. About that time Jung Kim came in, Sam Yick introduced him as the guide, and after he was introduced to me Jung Kim said, "Yes, I will be the guide; you will know me when I shake hands by my extra thumb." I believe Jung Kim also stated that he would be in San Diego August the 28th. At that conference Sam Yick had four pictures of the Chinamen who had been smuggled in. After this conference I went back to my station in San Diego.

The next time I met either of the defendants was on September the 10th, 1911, when I met the defendant Jung Kim on Eighth Street in San Diego. He asked me if I had heard from Morse, saying that he had the four cards and that the four Chinamen were in Tia Juana; that he was then going to Chinatown, but he was afraid to stop there and would get a room somewhere else, and would telephone me where it was and let me know when the Chinese were ready to come across.

I am testifying to these matters from my memoran-

(Testimony of A. G. Bernard.)

dum-book containing notes made at the time and not from independent recollection.

The next time I saw Jung Kim was on September the 11th; I met him on Eighth Street in San Diego; he asked me where Tia Juana was and said he would meet me on September the 12th at Tia Juana. I went to Tia Juana on the 12th but Jung Kim did not show up, while I was there however I got a telephone message saying that some one wanted to see me at Sixth and "J" Streets at five P. M., so I went there at five P. M., in company with a Mr. Sears and H. W. Weddle, the inspector in charge, and I met Jung Kim on Eighth and "I" Streets. Jung Kim produced the four cards marked in Chinese "E. P. M." on them, and also the names on them of Wah Sung, See Chew, Dock Yook and Ah Sing. (Here Mr. Stone handed witness slips.) Yes, those are the same kind of slips. [101] Then he told me that Ah Sing would not come over, so I took that card from him, or rather he gave me a card as that of one who wouldn't come; he said this man had crossed in Mexicali; he said the other three were found in Tia Juana at Mee Hong's place. He said he would telephone Mee Hong and have the Chinese come over September the 15th. The card I refer to as having been given back to me at that time by Jung Kim had the name Ah Sing on it.

Q. (By Mr. STONE.) I will ask you if that is it? (Handing slips to witness.)

A. That is it * * * . He said this Chinaman

(Testimony of A. G. Bernard.)

was at Mee Hong's place in Mexico; that is what he gave me.

Mr. STONE.—I offer this in evidence as United States Exhibit No. 8.

(The slip received in evidence, marked United States Exhibit No. 8 and read to the jury by Mr. Stone, and is as follows:)

[United States Exhibit No. 8—Memorandum Slip.]

A. G. B. received from Chang Kim—5 P. M. Sept.
12/11.

“(Chinese characters).”

MEE HONG

Apartado Num. 4

Tia Juana, B. CFA. Mexico.”

(Witness continuing.) After I left Jung Kim on this occasion I went down the street and passed Mr. Weddle and Mr. Sears, and as I passed I spoke to Weddle and said, “This is what I got from him,” showing him the papers I had just got from Jung Kim.

On the morning of September the 13th, at 8:30 o'clock, I again met Jung Kim on the train going to Tia Juana and we rode all the way to Tia Juana together. When the train got to Tia Juana Jung Kim got off, took the hack with a crowd of tourists and went over across the line into Mexico; that was probably about ten o'clock in the morning; he returned to the American side about 11:30 A. M. When he returned I was at the office and the inspector called me and said that a young Chinaman was downstairs, in [102] front of Lane's store. I went

(Testimony of A. G. Bernard.)

down and found Jung Kim there and he pointed out Mee Hong to me and said, "There is a man wants to meet you at the line." I said to Jung Kim, "Well, write something so that Mee Hong would know me," so Jung Kim wrote something in English and handed it to him.

Q. (By Mr. STONE.) Examine that. (Handed slip to witness.)

A. (Witness reading:) "September 13, 1911. 11:30 A. M. Mr. Jung Kim. That is it. I saw him write that, so did Inspector Nielson. When he gave me this note Jung Kim told me to show it to the boy, meaning Mee Hong, that he would know what to do.

(Writing offered and received in evidence and marked United States Exhibit No. 9, and is as follows:)

[United States Exhibit No. 9—Memorandum Slip.]

Mee Hong come See you too soon you till him
Read May

(marked) A. G. B.

(Written across top in ink:)

Tia Juana.

Rec'd Sept. 13-1911 at 11 30 A. M. from Jang Chung.

(Witness continuing.) When I got that note I looked over to where Jung Kim pointed and there was Mee Hong Standing at the line. I went over to the line, Mee Hong stood on the Mexican side, and I said, "Hello, Pat." Mee Hong says, "Hello, boy." I said, "Any new Chinamen Tia Juana?" He says, "Yes, you know three; little boy tell you." I said, "What little boy?" He pointed towards Jung Kim.

(Testimony of A. G. Bernard.)

I says, "They come across?" He says, "Yes, I think to-night." He says, "You let me take him?" I says, "I can't stop you." He says, "I expect little boy bring them over." And then he walked away from the line. During this conversation Jung Kim was sitting on a bench in front of Lane's store about twenty feet from the line watching us. I next saw Jung Kim about five o'clock that night when he told me that the boys would not come over to-night, that he had to go to town to get something for them, and that they would come to-morrow night, so Jung Kim got on the train, and Inspector Nielson rode on [103] the train to the first station to see that he did not get off. The next night I rode to San Ysidro, the next station to Tia Juana, on horseback and met the train coming in. Jung Kim got off the train; I motioned to him as he got off and he went straight towards the Mexican line; this was about dusk. I watched him going towards the line as far as I could, and then I rode back to Tia Juana, and at seven o'clock that night Nielson and I got in a wagon and drove to San Ysidro and we waited there until 8:30; then we drove on to Palm Avenue and we went in, put our team up and laid down behind the station until about 10:30. Jung Kim came along and passed us; we waited until he got quite a distance past to see if any Chinamen were following, when we found there were none following him I went on after him and asked him where the Chinamen were; he said they were right behind, I told him he had better go find them as I did not see them; so Jung Kim came

(Testimony of A. G. Bernard.)

back with us to the station looking for the Chinamen; then we went towards the line a little ways and couldn't find them; we hitched up the team, put Jung Kim in the wagon and drove on about a mile and searched all over the country until quite late; then we drove to Thirtieth Street, San Diego, and we lay out all night waiting for the Chinamen, but they did not show up, we did not find them at all, we stayed there until daylight, but the Chinamen never showed up. On the morning of September the 15th Jung Kim telephoned to my house and I met him on the street and we went together to a telephone station and he tried to get Mee Hong over the telephone and couldn't get him, and I made arrangements to meet Jung Kim that evening and look after the Chinamen, and that evening I picked up Inspector Nielson and Jung Kim at the cross-roads below Palm Station, Nielson and Jung Kim had walked out on the track to find the Chinamen, Jung Kim had played out and couldn't go any further so we had to take him back to San Diego.

On the morning of September the 16th, about 9:30, I got a telephone message from Jung Kim at the house telling me to come down right away. I met Jung Kim on "H" Street and he said, [104] "China boys in jail by paper I see."

Q. Said What?

A. He said, "I see by paper I see China boys in jail." I says, "Too bad; that settles it, then." He says, "Well, maybe you help me some." I says, "How?" He says, "Well, we find out maybe them

(Testimony of A. G. Bernard.)

in jail, maybe you help me, you give them some help.” So we went to the telegraph station—I don’t know exactly what time it was, some time during the morning, and he wrote out a telegram and I took the telegram and crumpled it up this way and I rewrote the telegram myself and he sent the telegram; that is, I sent the telegram from his writing to Bakersfield.

Q. What did you do with the original?

A. It is here somewhere. I turned it in in my report.

Q. (Showing paper.) Is that the telegram?

A. That is the telegram.

Q. Did you see Jung Kim write it?

A. Yes, he wrote it sitting down at the table in the—

Q. Wrote all that is on that?

A. Well, there is a lot of writing. Shall I read it?

Q. Well, show that that you wrote.

A. That is all I wrote on there.

Q. In blue pencil? (Showing.)

A. Yes, that is my signature “A. G. B.”

Q. Anybody else present when he wrote this?

A. Nobody to pay any attention to him, of course.

Mr. STONE.—You have seen this?

Mr. DOCKWEILER.—Yes.

Mr. STONE.—Q. Did you write any of that telegram except the identification blue mark on there, Mr. Bernard?

A. No, no.

Mr. MOTT.—You mean the copy. You wrote the telegram that was sent? [105]

(Testimony of A. G. Bernard.)

A. I wrote the telegram myself.

Mr. MOTT.—You yourself filed the telegram that you wrote yourself?

A. Yes, I sent that myself; yes, sir.

Mr. STONE.—You copied it from this?

A. I copied it from that.

Mr. STONE.—We offer this in evidence as Government Exhibit No. 7.

Mr. DOCKWEILER.—Well, I want to put in a formal objection. We object to the admission of it in evidence on the ground it is incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. DOCKWEILER.—Exception.

The COURT.—That I understand to be the original paper written by Jung Kim?

A. He wrote that himself, yes, sir.

Mr. STONE.—You slipped that in your pocket and made a copy?

A. I kept it in my hand; I kept it crumpled up in my hand; I didn't slip it in my pocket.

(Here telegram was received in evidence as United States Exhibit No. 7, read to the jury, and is as follows:)

(Testimony of A. G. Bernard.)

[United States Exhibit No. 7—Telegram, Dated September 16, 1911, from Jang Chang, to Gai Shee.]

A. G. B. Sept. 16/11, from 12 m.

Sept. 16th, 1911.

To Gai Shee

No. 723 18th St., Bakersfield, Cal.

fou chi na woo Sam goy yen duck yea I come back tomorrow.

JANG CHANG,
San Diego, Cal.
JUNG KIM.

(Witness continuing.) At the time Jung Kim sent the telegram he said he was sending it to Sam Yick; he didn't explain why he addressed it to Gai Shee. I don't know what other name Sam Yick goes under besides his own name; I didn't know anything [106] about Gai Shee. After he had sent the telegram Jung Kim asked me if he could see the boys that were in jail. I told him he certainly could and Jung Kim gave me a letter in Chinese and he says, "You give them this; they will feel better."

Q. (By Mr. STONE.) Examine this. Is that the letter? (Handing paper to witness.)

A. (Witness reading:) "A. G. B. September 16, 1912, noon." That is right after he sent the telegram he wrote that, about noon on the sixteenth.

(Paper offered for identification and filed as United States [107] Exhibit No. 10 for identification.)

(Testimony of A. G. Bernard.)

(Witness continuing.) I left town at 1:15 P. M. that same day, September the 16th, and I didn't see Jung Kim again until after I was stationed at Bakersfield, and I have never spoken to him since about this case.

Cross-examination by Mr. DOCKWEILER.

Since I have been transferred to Bakersfield I have met with no personal difficulties in the discharge of my duties; no one has attempted to kill me, no one has shot at me. I go to Chinatown quite frequently and have ever since I have been up at Bakersfield and no one has tried to interfere with me in the discharge of my duties there. After being told by the immigration officials to go to Bakersfield the first time I saw Sam Yick was August the 24th, 1911. I was taken over to Sam Yick's place by Mr. Morse; I met Mr. Morse about noon of that day and we went to Sam Yick's place at eight o'clock that night. During the time I first met Mr. Morse that day and our visit to Sam Yick's store, we talked over the case but we made no plans as to what course to pursue. When we walked to Sam Yick's store we intended to entrap him; we had made up our minds before we went there that we would entrap him. I talked over the case with Mr. Morse and knew what the case was, but no plan of action was outlined or agreed upon between us. Up to the time I got to Sam Yick's store I had never heard of Jung Kim that I know of in any way whatever. After going into Sam Yick's store that evening, as nearly as I can recollect, I walked through the store. was intro-

(Testimony of A. G. Bernard.)

duced to Sam Yick, went into a little room right behind the store and sat down there. Sam Yick sat down, Mr. Morse and I sat here and Sam Yick there. I was introduced as the man who would take care of the San Diego part of it. Sam Yick asked me some questions about the country as to how many soldiers [108] were on the line, or how many inspectors, about the number of Chinamen in Tia Juana, and which was a short road to Tia Juana; he said there were four Chinamen in Ensenada to smuggle, and that we would get two hundred and fifty dollars apiece, and he asked me which was the best way to bring them, which was the shortest road. I think it was at this point that Jung Kim came into the room. Mr. Morse and I were in the room with Sam Yick for quite a while before Jung Kim came in though we were interrupted twice by telephone messages. I don't think we were in there as much as half an hour before Jung Kim came in; Jung Kim was sent for by Sam Yick and when he came in he was introduced to me as the guide. After leaving Sam Yick's store I believe I returned that same night; I didn't see Sam Yick again until after I came back to Bakersfield and was stationed there, that was in April, 1912.

The first time I saw Jung Kim again was on Eighth Street, San Diego, on September the 10th. I had been told he was coming. I was expecting him. I didn't know definitely what day he was coming, August the 28th was the date first fixed, but as a matter of fact he didn't come until September

(Testimony of A. G. Bernard.)

the 10th. I met him before he telephoned me. I was not notified by Mr. Connell or Mr. Morse or anyone else of the day on which he was coming. After conference in Bakersfield I very likely made the suggestion that Jung Kim should telephone me as soon as he arrived in San Diego. On leaving Jung Kim in San Diego on September the 10th I took him aside and asked him for his birth certificate and he asked me if I had heard from Mr. Morse. I told him I had, and he said he had got the four cards for the China boys in Tia Juana. At the time I told Jung Kim I had heard from Morse I had not actually received any communication from him but the office had; I answered Jung Kim's inquiry evasively; I think my statement to him at that time, that I had heard from Mr. Morse, was not true. [109] Jung Kim left me then and said he would phone me when he was ready to cross the Chinamen. Jung Kim didn't tell me at that time that he had never been to San Diego before; I didn't know at that time whether he ever had or not. He didn't tell me at Bakersfield that he had never been to San Diego. I didn't take Jung Kim in a buggy to show him where the boundary line was; Mr. Nielson didn't do it; I am absolutely certain of that; I don't know how Jung Kim knew how to go over to Tia Juana; I didn't tell him how to get there; I will swear that I didn't; I didn't take him and show him how the Chinamen were to be brought over or what time they were to come over, and I know that Mr. Nielson never did because he was with me practically all the time, or else

(Testimony of A. G. Bernard.)

stationed where he could not get Jung Kim.

My next meeting with Jung Kim was on "H" Street on September the 11th; he was alone.

Q. Well, what was said?

A. He said he had been out on the San Diego railroad.

Q. By him to you or by you to him?

A. He said he had been out on the San Diego railroad as far as the brewery, which was Thirtieth Street. Then he wanted to know how to get to Tia Juana. Then he said he would meet me at Tia Juana September 12th.

Q. Now, when he asked you how to get to Tia Juana what did you say to him, if anything?

A. I said, keep walking.

Q. Is that all? A. Yes, sir.

(Witness continuing.) All I said to Jung Kim at this time was to keep walking. I didn't tell him in what direction to walk. I was anxious to entrap him; I was doing everything in my power to bring about his entrapment, but I said nothing else to him in answer to his inquiry, except, "keep walking." At this meeting [110] Jung Kim said he would meet me at Tia Juana September 12th; this was an accidental meeting and there was no one else present that I remember. When I say the meeting was accidental, I mean as far as Jung Kim was concerned. I was watching him and tracking him wherever he went; at least I was trying to but didn't make a very good success of it. Jung Kim never refused to give me any information when I asked for it.

(Testimony of A. G. Bernard.)

The first I knew of this case was when I received a telegram calling me to Los Angeles on May the 22d, 1911. The telegram was sent by Mr. Connell and I talked the matter over with Mr. Connell and the district attorney. At that time in May, 1911, there was some fighting going on on the border between the I. W. W. and the town of Tia Juana, and there had been some trouble at Mexicali, and also Alamo, and the border was in a state of excitement during that time and up until the 22d of June. On that date the Mexican Federal Troops took the town of Tia Juana, and after this things quieted down along the border. I first became active in the Sam Yick case on September the 10th, 1911, excluding the date of the conference at Bakersfield August the 24th. I did nothing actively in any way whatsoever in the Sam Yick case or with reference to entrapping Sam Yick prior to August the 24th.

Q. I hand you a letter and ask you if the signature appearing thereon, A. G. Bernard, is your signature? (Handing paper to witness.)

A. That is my signature.

Q. You wrote that letter? A. Yes, sir.

Q. I will read it to you. (Reading.) "Office of inspector in charge, San Diego, Cal., June 23, 1911."

A. That is the day after the town was taken.

Q. But I was asking you if you had been active in

(Testimony of A. G. Bernard.)

this case prior to August 23. I will show you this so you can see it. [111]

(Reading:)

“Inspector in Charge Immigration Service,
Los Angeles, Cal.

Through official channels.

In reference to the case of Sam Yick of Bakersfield, Cal., I have to state that the country below Tia Juana, Cal., is now open to traffic and we may expect overland passing of Chinese at any time now, especially so as some of the most notorious Chinese smugglers are with the Federal troops as scouts and the taking of Tia Juana will very likely leave them without employment. There are a large number of Chinese at Ensenada and it appears to me that some smugglers will be apt to have a bunch of Chinese at Tia Juana in a very short time. Respectfully,

A. G. BERNARD,

Immigration Inspector.”

In reference to the case of Sam Yick at Bakersfield, what did you mean when you used the term, “I have to state that the country below Tia Juana, Cal., is now open to traffic”? Can you explain that?

A. Well, the letter states general conditions along the border, and I had been told that as soon as the matters along the border were settled there would be some action in the Sam Yick case.

Q. Oh. Now, was it not true that the town of Tia Juana having been captured by the Rebels, or whatever they were, in Mexico, and things having smoothed down and the trouble on the border ad-

(Testimony of A. G. Bernard.)

justed, the time had come to encourage Sam Yick to get into this smuggling game? Now, wasn't that the idea? A. No, sir.

Q. That it was an appropriate time to bring Chinese across the border?

A. No, sir. I was stating conditions as they were at the border and calling attention to the fact that, if anything of that kind would happen I should be right on the job and not sent somewhere else. That is what that has reference to.

Q. Now, you a little while ago answered me that you had done nothing actively in the Sam Yick case prior to August 24. A. Exactly.

Q. And yet, here on June 23, 1911, you called special attention to Sam Yick of Bakersfield, and also called your superior's attention to the fact that the situation now was a very [112] agreeable one, in effect, to bring Chinese over. Didn't you mean by that that the time was propitious for your superior officers to get after Sam Yick and get Sam Yick to start in and get those Chinamen over?

A. No, sir. As I have stated before, it was that I should be on the job if anything was started. That I shouldn't be moved anywhere else. I had been moved around quite a bit.

Q. Well, now, as a matter of fact, you had heard before, as a matter of recollection now, before June 23, 1911, of Mr. Morse's scheme to entrap Sam Yick?

A. Well, I heard of that in May.

Q. In May. But May was a very unpropitious month to try anything of the kind, wasn't it, on ac-

(Testimony of A. G. Bernard.)

count of the disturbed conditions?

A. Yes, sir.

Q. Isn't that true? A. Yes, sir.

Q. In other words, nobody could very well have gotten any Chinamen across, or anybody else across the border at that time? A. Yes.

Q. There were contending forces there?

A. Yes.

Q. Fighting—they were at war down there. All right. But, just as soon as the war stopped, you thought the time was a good time to bring on Sam Yick, if he could possibly be gotten to come down there, or have some one go down there for him, didn't you, now?

A. No, as I stated before, I called attention to the fact that something might be starting; I didn't want to get moved.

Q. But didn't you notify the office that this was a good time to get things started? [113]

A. This office didn't have anything to with that.

Q. Well, wasn't this communicated to Morse at Bakersfield?

A. They could do as they liked with it.

Q. But what was your intention?

A. As I say, I called attention to the fact that something was liable to start at any time, and I didn't want to be moved.

Q. Why? Had there been any talking of moving you at that time? A. Yes, sir.

Q. Well, why did you start your letter by saying, "In reference to the case of Sam Yick at Bakers-

(Testimony of A. G. Bernard.)

field, Cal., I have to state that the country below Tia Juana, California, is now open to traffic''? Why did you make that statement?

A. Well, if I recollect properly, there is a letter on file at San Diego that says nothing would be done on account of the conditions and soldiers and—

Q. Oh, in other words, that is it, you wrote this letter to notify this Los Angeles office that the situation had changed down there, isn't that true?

A. Yes, sir.

Q. The Los Angeles office had written you that there would be nothing done in Sam Yick's case for the present, on account of the disturbed conditions or something to that effect?

A. I don't know what the letter was, but that is my impression.

Q. Your impression? A. Yes, sir. [114]

(Witness continuing.) Jung Kim was going to meet me at Tia Juana on the 12th and he didn't show up. I took my team and drove to Tia Juana myself and waited for him. I met Mr. Neilsen at Tia Juana. I never helped Jung Kim or gave him a lift to get to Tia Juana. I don't know that Jung Kim said to me at any time that he wasn't familiar with the country around San Diego, but he was inquiring of me once or twice as to where and how he could get to Tia Juana. I judged from his inquiries that he didn't know much about the country. At the time I met Jung Kim when he informed me that he had walked along the railroad track as far as the brewery. I said nothing else to him in answer to his inquiry

(Testimony of A. G. Bernard.)

as to how to get to Tia Juana, except, "keep walking" I gave him no other directions than that, it was possible for him to walk in a number of directions from there, but I didn't care which direction he took, though I wanted to entrap him, and I was anxious for him to be sure *to over* to Tia Juana and to do so in such a way that the Chinamen would actually be brought over.

Q. You have been reading from a book here, and I find, Mr. Bernard, that it is not a diary, is it?

A. It is a diary as far as this case is concerned consecutively.

(Witness continuing.) Some of the memorandums in this book were made on the train and some were made this year; they were not all made on the dates they appear to have been made in the book, this is an expense-book and a memorandum-book. I had to use only one book so I put part of my memorandums in here to keep track of what I did each day.

Q. Now, run along there, and show us where the entries in this Sam Yick case were made.

(Witness continuing.) I have to turn the book upside down in order to get the entries in the Sam Yick case; they commence [115] on the fourth to the last page of the book after the book has been turned upside down. I made a special case of this in this book and I didn't follow the chronological order in making my entries. Under date of August the 24th, 1911. I have no memorandum of going up to Bakersfield. The next memorandum after that date appears to be under date of November the 8th.

(Testimony of A. G. Bernard.)

I used this book in chronological order from the time I got it, making entries on each succeeding page up to and including December 1911, and I made no entry in chronological order of anything in connection with the Sam Yick case. It is not a fact that these entries in the back of the book were made long after the occurrences in connection with the months of August and September, 1911; there is blue pencil used in the book and ink and all kinds of pencils. (Here book is introduced in evidence and marked Defendant's Exhibit "A.")

(Witness continuing.) On the night of September 12th I met Jung Kim at Sixth and "J" Streets, at San Diego, about five o'clock. Inspector Weddle and George Sears were with me. He told me that the three boys were over at Tia Juana and were to cross the next day; he said that he would meet me at Tia Juana the next day; he said he was going on the train; he told me he was going to take the San Diego and Arizona train which left at that time at 9:15 A. M., and reached Tia Juana at 10:00 A. M. I saw Jung Kim that next day, September the 13th, at Tia Juana; he crossed over into Mexico as soon as he got off the train; he took the boys and went over; I met Jung Kim at about 8:30 that morning at the depot in San Diego and I sat alongside of him on the train all the way to Tia Juana; he kept looking out of the window and inquiring what road that was and what this building was, and I told him. Nothing was said by Jung Kim to me or by me to Jung Kim on the way down on the train, except that he would bring the

(Testimony of A. G. Bernard.)

Chinamen over that night; he didn't tell [116] me when he was going to bring them over, and he didn't talk about the place to which they were to be brought over. All roads from the boundary line led to Palm Station, which was where I and Inspector Nielson watched for him that night, because he had to come by there unless he went by way of Coronado; Palm Avenue is about three miles from the International boundary line; at no time on the way down on the train did I indicate to Jung Kim the spot where he was to bring the Chinamen over; I sat there in a receptive mood and volunteered no statements to him; he acted as though he knew nothing about the country, inquiring about everything that he came to. I cannot swear that Jung Kim brought in Chinamen over across the line that night; I didn't find any of them and we both looked for them as far as San Ysidro, which is about a mile and a half from the boundary line; I don't know whether these Chinamen came over by themselves or whether Jung Kim brought them over.

At the time Jung Kim sent the telegram to Bakersfield, he told me that he wanted to send a telegram and I showed him where the telegraph office was and took him down there. I didn't tell him that he ought to send a telegram to Sam Yick. Jung Kim simply wanted to tell Sam Yick that it was all off and that he was coming home. Jung Kim had to ask me in order to find out where the telegraph office was; he telephoned me early on the morning of the 16th of September, and the telegram

(Testimony of A. G. Bernard.)

was sent at noon that day; he asked me to meet him at his hotel but I met him on the corner of H and Sixth Streets; he had already told me on the telephone what was the matter; he told me over the phone, "I see you catch him boy." I said I didn't know anything about it; I guessed the police got them. Jung Kim said, "You no catch them?" I said, no, that the police had got them, that we had been out all night looking for them, and Jung Kim said, "Well, I guess all off; I think pretty soon look for me." I said, "No, I [117] guess not; no danger of you getting caught." When I met him on the street he wanted me to see what I could do for the Chinamen. He said he wanted to have them sent to Mexico. I think it was about 11:30 in the morning when I escorted him to the telegraph office. I led him up to the Western Union Telegraph office between D and E Streets on Fifth Street; this was about five or six blocks from Jung Kim's Hotel. Fifth Street is a leading street in San Diego, and it is probably about six blocks from Jung Kim's hotel to the telegraph office, and the way was located along the principal business portions of San Diego. There was no discussion before we entered the telegraph office as to the nature of the telegram to be sent to Sam Yick. Jung Kim wrote several telegrams and tore them up. When he had written the telegram that is in evidence here he handed it to me and I stepped right up to the center of the office and copied it immediately; I made no suggestion before of anything that he was to say in the telegram; the

(Testimony of A. G. Bernard.)

whole telegram was the composition of Jung Kim himself. I do not know why he did not file it with the clerk and have it sent off when he was through writing it. I took it from him and said I would send it. I do not think Jung Kim saw me copy the telegram. I had my back turned to him. I just stepped over, made a copy and handed it to the clerk. Jung Kim seemed to be absolutely dependent upon me to find out first where the telegraph office was and secondly as to the manner in which the telegram should be sent; it seemed to me that if I hadn't been there Jung Kim wouldn't have known how to have written or sent this telegram without the aid of somebody else. I didn't tell Jung Kim what was to go in the telegram. It was the night of the 14th and part of the 15th that we stayed out all night until Jung Kim was tired out; we left Tia Juana at about 7 o'clock that night. Inspector Nielson was with me and we travelled in a light wagon with a double team. We drove from Tia Juana to San Ysidro, and there we waited until about 8:30; then we went on to Palm Avenue and we hid there until 10:30. Jung Kim came [118] along about 10:30 that night. After Jung Kim had passed by I followed him on the track and asked him where the Chinamen were, and when he said they were close behind I made him come back to look for them; they were not there at all. Then Jung Kim and I met Nielson, and then we hitched up the rig, and with Nielson driving the three of us went in the direction of the line looking for them everywhere, any place

(Testimony of A. G. Bernard.)

we thought they possibly might be, and we didn't find them. After traveling around for a while Jung Kim got tired and we put him in the rig and drove to Thirtieth Street, where we stayed and waited all night; we watched half the night and Nielson the other half. Jung Kim got one of the first cars into San Diego after daylight and went back to his hotel. The police were not co-operating with me in any way and the arrest of the three Chinamen by them, was purely accidental.

Redirect Examination.

(By Mr. STONE.)

Neither of the defendants at any time gave me any money. On the night when we met Jung Kim and looked for the Chinamen, Jung Kim didn't say that he had brought them across the line.

[Testimony of A. R. Nielson, for the Government.]

A. R. NIELSON, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. STONE.)

My name is A. R. Nielson. I am an Immigrant Inspector and have been so for about six years. I have been stationed at El Paso and at San Diego and along the Canadian border. I came to San Diego and was stationed there in August, 1911. I have seen the defendant Jung Kim; the first time I *was* him was on the 13th of September, 1911; at Tia Juana; I saw when he got off the train from

(Testimony of A. R. Nielson.)

San Diego at Tia Juana. I was inspector on duty at [119] Tia Juana at that time.

Mr. Bernard came on the same train that time. The train arrived in Tia Juana about ten o'clock in the morning. As soon as Jung Kim got off the train he got in a wagon and went over to Tia Juana, Mexico. After about an hour and a half he came back to the American side of the line. I called Mr. Bernard, and Mr. Bernard had a conversation with him; I heard the conversation; they were talking about certain Chinese, three or four of them, I believe, to be brought from Mexico to the United States; Jung Kim took a slip of paper and wrote a note and handed it to Mr. Bernard right in the store there, on the line, and told him to give it to another Chinaman that was across the line, and that this Chinaman would know what to do; I saw Jung Kim write the note.

(Here Mr. Stone hands paper to the witness, United States Exhibit No. 9.)

(Witness continuing.) Yes, that is the note. About five o'clock of that same evening I saw Jung Kim as he took the five o'clock train back to San Diego. The next time I saw Jung Kim was about ten o'clock of the evening of September the 14th at Palm Station. Inspector Bernard was with me, and we were watching at Palm Station, and Jung Kim came walking along about ten o'clock, or half-past ten. He was going in the direction of San Diego. Mr. Bernard intercepted him after he had passed us and called him back to the place where we

(Testimony of A. R. Nielson.)

were watching; we asked Jung Kim what had become of the Chinamen. He said, "They are right behind me." And we then waited for probably five minutes and nobody showed up, so we began a search for the Chinamen, and searched probably an hour or two, and didn't find them; then we went towards San Diego and watched outside of San Diego for the balance of the night. Jung Kim was with us until daylight. The next night, September the 15th, Jung Kim went with us down to Palm Station to look for the lost Chinamen. We searched down there until probably about ten o'clock that evening; then Jung Kim got tired and [120] took him back to San Diego in our wagon; that was the last time I saw Jung Kim.

Cross-examination by Mr. DOCKWEILER.

I searched for Chinamen on two occasions, the night of September the 14th and the early morning of the 15th, and I found none. On the 13th of September I saw Jung Kim with Bernard; they both got off the same train; they were not talking together at the time. After getting off the train Bernard came to me and said, "That is the man that works in connection with the Sam Yick case." Jung Kim got on a wagon and went over to Mexico and he was gone about an hour and a half or two hours. When he came back, Bernard went out to meet him. Jung Kim came back alone on foot; I heard him say that the Chinamen would not be ready that day, and that they would be one short, that one Chinaman would not come; I next saw Jung Kim at

(Testimony of A. R. Nielson.)

five o'clock that evening, when he got on the train to go to San Diego. Bernard told me to get on the train and watch to see if any Chinamen got on between Tia Juana and the next station, but no Chinese got on. The next time I saw Jung Kim was the next day about ten o'clock in the evening when he passed Bernard and myself along the railroad track, and Jung Kim and myself and Bernard all looked for Chinamen that night and until very early next morning, and found none. The next evening again we took Jung Kim out and looked for Chinamen; we found none, but Jung Kim got so tired we took him home.

[Testimony of Chan Kiu Sing for the Government.]

CHAN KIU SING, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is Chan Kiu Sing. I can speak and write both in [121] English and Chinese. I know how to translate Chinese into English. I am the interpreter in this court.

(Here Mr. Stone shows witness United States Exhibit No. 10 for identification.)

Q. (By Mr. STONE.) I show you U. S. Exhibit No. 10 marked for identification as Exhibit No. 10 and a translation of it purporting to have been made by you. I will ask you whether you have translated that Chinese letter, and if so, is that the translation in English which you have signed? (Handing

(Testimony of Chan Kiu Sing.)

paper to witness.) A. Yes, sir.

Q. Is that a correct translation?

A. Yes, sir, to the best of my knowledge.

(Witness continuing.) This is almost a literal translation of the Chinese letter and this is my signature on the translation.

(Here the letter was offered and received in evidence as U. S. Exhibit No. 10, and was read to the jury by Mr. Stone and is as follows:)

[United States Exhibit No. 10—Translation of Letter, Dated Los Angeles, California, March 26, 1914.]

Translation.

“Los Angeles, California, March 26, 1914.

Respectfully expressed as to inquire about the foreign friend; when you see this letter you will know that in twenty days' time will return to Mexico. I determine to come over to get you to the city of Bakersfield. I left this morning to come out. Need not to worry. You must destroy the three small slips of paper that you had in the days before, and if on what day you are to come out I say ask him to write and let me know. When you get back to Mexico write me of your stopping place. Must not keep this paper. Cast it out after reading same.”

(In handwriting.) “The above is a correct translation of Govt. Exhibit No. 10. Chan Kiu Sing.”

[**Testimony of Edward P. Morse, for the Government
(Recalled).**]

EDWARD P. MORSE, a witness called on behalf of the Government, being recalled, testified as follows:

A JUROR.—If your Honor please, I would like to ask a question of the witness.

Mr. STONE.—No objection.

Mr. DOCKWEILER.—No objection. [122]

Q. (By JUROR.)—I would like to ask you, Mr. Morse whether at any time your superior officer did ever suggest to you that it may be as much your duty to suppress a crime or prevent a crime as it was to arrest a person after the crime had been committed?

A. No, sir, he did not. At the conversation or conference held with the assistant United States Attorney, Mr. Stewart, my superior officer, Mr. Connell, Inspector Bernard and myself had instructions from the U. S. Attorney to entertain any proposition that was made to us; to act in a receptive mood only and to act along the lines suggested by Sam Yick and Jung Kim, but we had no instructions to—or no suggestion was made, as you state to suppress whatever suggestions were made.

Q. It never entered your mind that it might be your duty to prevent a crime?

A. Well, I took up the matter with my superior officers and followed their instructions and the instructions of the Assistant United States Attorney.

The COURT.—Go on, gentlemen.

Q. (By Mr. DOCKWEILER.) Have you that

(Testimony of Edward P. Morse.)

letter to which I referred the other day?

A. The letter has been in the files; it has been in your hands for several days.

Q. Well, have you that letter now? A. No, sir.

Q. Is it here?

A. Yes, sir, I suppose so. I haven't seen it this morning; I saw it yesterday.

(Witness continuing.) (In answer to question by Mr. Stone.)

And that is the letter you wrote to Mr. Connell? (Examining letter handed to him by Mr. Stone.)

By Mr. STONE.—The letter is dated Bakersfield, Cal., 5/10/11, and addressed to the Inspector in Charge, immigration service, [123] Los Angeles, signed by Edward P. Morse, Chinese Inspector. That portion of the letter referring to Sam Yick says: (Here Mr. Stone reads portion of letter to jury:) “He said he would expect to make some arrangements so as to get the Chinese past the immigration officer at San Diego, Cal. And I told him that could be arranged for later on. I left him with the understanding that he was to write to me and let me know just as soon as he received the photo. I will be glad to receive suggestions as to the best way to proceed in the matter.”

**[Testimony of George M. Sears, for the
Government.]**

GEORGE M. SEARS, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

I live in San Diego. I am in the real estate business. I am acquainted with A. G. Bernard, Immigrant Inspector, and with Mr. Nielson. I have known *tham* for about three years; I know the defendant Jung Kim by sight; the first time I saw him was on the 12th of September, 1911, on Sixth Street, San Diego, between H and I streets. Mr. Weddle, the inspector in charge at San Diego, was with me; Mr. Bernard was with Jung Kim; they were standing on the sidewalk about in the center of the block. I couldn't hear anything that they said and I didn't see them when they first met there; they were standing there talking when I went by; I am positive Jung Kim is the same man I saw talking with Mr. Bernard on the 12th of September at that particular place.

Cross-examination by Mr. DOCKWEILER.

I have only seen Jung Kim once before in my life before seeing him in the courtroom here, and that was on September the 12th, 1911, on the occasion that I have testified to; on that occasion I was walking down the street with Mr. Weddle, the [124] Inspector in Charge of Immigration Service at San Diego, and Mr. Weddle called my attention to

(Testimony of M. Sears.)

Bernard and Jung Kim talking, and pointed out to me that Jung Kim had two thumbs and to look at them so that I would recognize him again.

[Testimony of B. Moriarity, for the Government.]

B. MORIARITY, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is B. Moriarity. I live in San Diego. I am Captain of Police there and have been such for about ten years. I was Captain of Police there in October, November and December, 1911. I remember the circumstance of three Chinamen being arrested by the police and put in jail there; the date was September the 15th, 1911; I was present when the Chinese were brought to the station. The Chinamen when brought to the station had a slip of paper in their hands. I took these slips of paper and turned them over to Mr. Weddle, the Inspector of Immigration, later on. I marked the slips by writing my name and the date on them. (Here slips are handed to witness.) Yes, those are the slips that I have reference to; each of the Chinamen had one of those slips when arrested. The Chinamen gave the names on those slips when they were arrested.

(Here Mr. Stone exhibits U. S. Commissioner's docket at San Diego to the witness.)

(Witness continuing.) After examining these three pictures in this docket, I would say that in my judgment they are pictures of the three Chinese I

(Testimony of B. Moriarity.)

have testified about. After the Chinamen were arrested they were taken in charge by Mr. Weddle, Immigrant Inspector.

Cross-examination by Mr. DOCKWEILER

These three Chinamen were brought into this station between [125] eight and nine o'clock in the evening of September the 15th. Mr. Weddle was not there when they were brought in but arrived about ten o'clock. I happened to mark these slips in the way I have testified to because I suspected that the Chinamen were contraband and the slips would be used in evidence.

[Testimony of J. K. Wilson, for the Government.]

J. K. WILSON, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is J. K. Wilson. I have lived in San Diego about thirty years. I am Chief of Police of San Diego, and I was such Chief of Police in September, 1911. I remember the circumstance of three Chinese being arrested and turned over to me in September, 1911; the date was September the 15th. Between eight and nine o'clock in the evening I was out on a burglary call, searching a house to get a burglar, and as I got through a little boy came running across the street on Sixteenth Street, between J and K, and told me two civilians were over there holding guns over two Chinamen, and he wanted me to come over there and see what was the trouble, and I ran over

(Testimony of J. K. Wilson.)

there to where there was a big water trough, and these three Chinamen were sitting on the trough and two civilians holding them. The civilians holding them were named Freeman and Harmon. Harmon told me that the Chinese were running and they held them up; they had been out walking through the sagebrush and had all fallen in the water and got wet. I put all three Chinamen in a machine and took them to the Police Station and turned them over to Captain Moriarity and told him to search them. I immediately telephoned Mr. Weddle, the Immigration Inspector, and he came down and took charge of the Chinamen. Each of the Chinamen had a little slip of paper. (Here slips are handed to witness.) Yes, these are the three slips. I remember those initials being [126] on there. (Here the witness is shown U. S. Commissioner's docket at San Diego.)

Q. Will you please examine this docket?

A. This is the little fellow. This is Chew, the small, little fellow.

Q. He called himself, what?

A. Chew. The reason I remember him is we joshed him because we had an officer named Chew on the force. I remember him well. That is all of that.

Q. Those three? A. Yes.

Q. As shown on pages 31, 32 and 33 of the Commissioner's docket?

A. Yes. I remember, the little fellow, Chew. But that is the three names.

(Testimony of J. K. Wilson.)

Cross-examination by Mr. DOCKWEILER.

The civilians who had stopped the Chinamen had no connection whatever with the Police Department; they simply had seen the Chinamen running and that created a suspicion in their mind and they ordered them to stop. I took them into custody because on questioning one of the Chinamen he told me had come from Mexico, and it was evident that they had been traveling. The arrest of these Chinamen was purely an accident. It was not done at the request of the Immigration officers. I didn't know of any plan to bring over Chinamen.

[Testimony of H. T. Christian, for the Government.]

H. T. CHRISTIAN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is H. T. Christian. I am United States Commissioner for this district at San Diego and have been such for five or six [127] years; I was such Commissioner in September, 1911.

(Here Mr. Stone hands book to witness.)

(Witness continuing.) Yes, that is my docket during that period. I write my own docket. The entries on pages 31, 32 and 33 of this book are the docket entries in three different cases showing the trial of the defendants See Chew, Dock Yook and Wah Sung, each of the defendants was ordered deported; these are photographs of the several defendants; these defendants were ordered deported to

(Testimony of H. T. Christian.)

China on September the 20th, 1911; the grounds of deportation were that they were not entitled to be or remain in the United States as Chinese laborers.

[Testimony of Martha L. McCrea, for the Government.]

MARTHA L. McCREA, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is Martha L. McCrea. I live at San Diego. I have lived there for three years. In September, 1911, I lived at the Fernbrook Hotel, at San Diego, with my mother, who conducted the hotel. I saw Jung Kim in my mother's hotel about eleven o'clock in the morning of a day in September, 1911. I don't remember the exact date. He had a room there at my mother's hotel, I think from the 9th to the 17th of September. During the time he was there I saw him about three times but never talked to him.

Cross-examination by Mr. MOTT.

I never saw Jung Kim have any visitors while he was staying at my mother's hotel.

Redirect Examination by Mr. STONE.

I did hear Jung Kim telephoning to Tia Juana one morning while he was at my mother's hotel. He was telephoning about meeting some [128] friends over in Tia Juana.

[Testimony of Elizabeth Dickson, for the Government.]

ELIZABETH DICKSON, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is Elizabeth Dickson. I live at Lakeside, California. In September, 1911, I was living at the Fernbrook Hotel, in San Diego. I was running the hotel with my sister in law, Mrs. Carrie McCrea, the mother of Martha L. McCrea, the witness who has just testified. I was at the Fernbrook Hotel the whole month of September, 1911. The defendant Jung Kim came to the hotel about the 9th of September, 1911, and took a room there. He stayed about a week; he rented his room by the night and not by the week. He registered when he came to the hotel. I know he signed his last name Kim, but I didn't know what the first name was. He wrote the last name in English letters.

Cross-examination by Mr. DOCKWEILER.

I don't remember what first name Kim wrote. As far as I know he came to the hotel alone. I never saw any of the immigration officers around the hotel and I don't know whether or not he had any visitors.

[Testimony of Carrie McCrea, for the Government.]

CARRIE MCCREA, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is Carrie McCrea. I live in San Diego.

(Testimony of Carrie McCrea.)

I had a rooming-house in San Diego, called the Fernbrook, in September, 1911. I had the register leaf of the Fernbrook Hotel for the month of September, 1911, including the night of the 17th of September, 1911, [129] but it was lost or destroyed at the Rosslyn Hotel here in Los Angeles, the second trip I made here in connection with this case; it was taken from my room and destroyed there. I remember that the name Jung Kim appeared on this register here; it was written in English, and I saw Jung Kim sign his name because I rented him the room. He rented it just by the night but only registered once; the name was written on the register, Jung Kim. Jung Kim was there at the hotel from the 9th of September to and including the 16th; I heard him telephoning one morning from the hotel to Tia Juana. I don't know who he was telephoning to or what he said.

Cross-examination by Mr. DOCKWEILER.

The Fernbrook Hotel is located on Sixth Street, between H and I Streets, San Diego. I didn't see Inspector Bernard at the hotel while Jung Kim was there. Inspector Weddle was at the hotel. It is possible that people might have come in to visit Jung Kim without my knowing it.

Redirect Examination by Mr. STONE.

The time I saw Mr. Weddle at the hotel was after Jung Kim had left. Mr. Weddle inquired if such a man had been there.

[**Testimony of Charles T. Connell, for the Government.**]

CHARLES T. CONNELL, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is Charles T. Connell. I am inspector in charge of Immigration Service for the Southern District of California. I have been in the immigration service about twelve years. I know Mr. E. P. Morse. I know who the defendants Sam Yick and Jung Kim were. I have seen them in court. I remember the circumstance of Mr. Morse being detailed to Bakersfield as an inspector. We kept [130] him there the greater part of January, 1911, and the latter part of December, 1910, but I can't give you the exact date when he left for Bakersfield, but I think it was sometime in January, 1911. Bakersfield was in my territory at that time, and there had not been an inspector stationed there previously. As inspector in charge I was familiar with conditions around Bakersfield prior to the time Mr. Morse went there. I remember the time when Mr. Morse came in to see me about the proposition made to him to smuggle Chinese at Bakersfield; that was on May the 10th, 1911. I saw him on the morning of that day in my office in the Federal Building, Los Angeles.

Q. What was the conversation about in your office? You needn't tell what was said, but in reference to what subject was it?

(Testimony of Charles T. Connell.)

Mr. DOCKWEILER.—Of course, our objection interposed yesterday to this line of testimony still holds good.

The COURT.—Very well.

Mr. DOCKWEILER.—Is that true?

Mr. STONE.—Oh, yes; it is stipulated you may have your exceptions.

The COURT.—It would be competent for the defense, of course, to draw out the details of that conversation if you want to.

Mr. STONE.—Yes.

The COURT.—But I understand you do not want to do it.

Mr. STONE.—We are willing for all of it to come out.

The COURT.—I say it would be competent for the defendants to draw it out. But you are not proposing to put the evidence in yourself?

Mr. STONE.—No, sir.

Q. (By Mr. STONE.) Just state the subject of the conversation.

Mr. DOCKWEILER.—Of course, it is understood that neither of [131] the defendants was present.

Mr. STONE.—Sure.

A. He stated that a proposition had been made to him by one Sam Yick at Bakersfield.

The COURT.—Well, that is going into details, and I will exclude any detail that might be prejudicial to the defense. We want the general subject matter only that they were talking about.

Mr. STONE.—Yes; I want him to state the subject

(Testimony of Charles T. Connell.)

matter without giving any details; that was my question to the witness.

Q. (By Mr. STONE.) Can you state the subject matter about which you talked, without stating the details of what was said? A. He stated that—

Q. No, what was the subject matter? Did you talk about raising horses or alfalfa?

A. In regard to smuggling Chinese.

Q. Yes, and at what point?

A. At Bakersfield and across the border below San Diego.

Q. Did you give him any instructions as to what to do about the report he had made to you?

A. Yes, sir.

Q. What was that instruction?

A. The instructions were to follow out any suggestions made by the parties making the proposition.

Q. Were there any other instructions about what to do with that report, as to putting it in writing?

A. Yes; he reported to me verbally, and I told him to put it in writing.

Q. And did he put it in writing?

A. Yes, sir, on that day.

Q. On what date was that?

A. May 10, 1911.

Q. I will ask you to state if that is the letter (handing [132] paper to witness).

A. Yes, sir.

Q. And what did you do next with reference to this matter that he mentioned to you, after you received this report?

(Testimony of Charles T. Connell.)

A. Later on I took it up with my superior officers, the matter, and with the United States Attorney.

Q. Who was the United States Attorney that you took it up with? A. Mr. Frank Stewart.

Q. Who were your superior officers?

A. F. W. Berkshire, supervising inspector of the Mexican Border district, with headquarters at El Paso, Texas.

Q. You took it up with him before you took it up with the United States Attorney here?

A. I had had some conversation with Mr. Stewart about it previous to that time.

Q. And who was present when you took it up with the United States Attorney?

A. Inspector Morse, Inspector Bernard, Mr. Stewart, and myself.

Q. And after that conference, what did you do next in reference to this matter?

A. You mean what instructions I gave?

Q. Yes. Who did you give instructions to?

A. I gave instructions to Inspector Morse and to Inspector Bernard.

Q. Where was Inspector Bernard located at that time? A. San Diego, California.

Q. And do you remember how you notified him to appear here for service? A. Yes, sir.

Q. In what manner? [133]

A. I telephoned to the inspector in charge at San Diego.

Q. Did you send him a telegram at any time?

A. I am not certain whether it was a telegram or

(Testimony of Charles T. Connell.)

a telephone message to the inspector in charge under whose direction Mr. Bernard was working at that time at San Diego.

Q. Then do you know who gave Mr. Bernard his directions in the matter?

A. I gave him his directions. All those officers are under my immediate direction.

Q. And your superior officer that has charge of the Mexican Border, the Mexican service all along the border—

A. Yes, sir.

Q. —and the Assistant United States Attorney, Mr. Stewart—

A. Yes, sir.

Q. Had you received advices from them before doing so?

A. I had, yes, *at time*, and by telegraph from Mr. Berkshire.

Q. Up to that time, and when this report was made to you, had you received any information of smuggling going on at Bakersfield?

A. In a general way, yes, sir.

Mr. DOCKWEILER.—Of course it is stipulated that every question that has been proposed is subject to our objection that it is incompetent, irrelevant and immaterial.

Mr. STONE.—No; I have never made that broad a stipulation, your Honor.

Mr. DOCKWEILER.—Well, look here.

The COURT.—You will have an abundant opportunity to be heard, Mr. Dockweiler. I am not disposed to admit this question if it is objected to.

(Testimony of Charles T. Connell.)

Mr. STONE.—All right, then, I will withdraw it if it is objected to.

The COURT.—You had better understand this stipulation, because [134] it runs to all this line of testimony. It is being objected to and ruled adversely upon.

Mr. STONE.—That is true, but there is a misunderstanding between counsel and myself and your Honor. Mr. Dockweiler has several times said that he wanted all objections stipulated to go to the questions about the reports made to the superior officers and this man acting under the superior officer. I stipulated he might have an objection and exception to all that testimony. Now, he gets up here and says—I would like to have the stenographer read it—that it is stipulated that they have an objection to all of the testimony. I think if he wants to object to all of the rest of the testimony he may do it.

The COURT.—I take it he wanted to emphasize the objection with reference to this question.

Mr. STONE.—But I do not want to appear in the record that every question that is asked the witness here is understood to be objected to.

The COURT.—You had better, then, withdraw your stipulation for the future. Let it apply to those questions already propounded. But the last question is certainly one that I will sustain the objection to. Now, you understand, Mr. Dockweiler, that that stipulation is withdrawn, because there might be a misunderstanding as to what it applied

(Testimony of Charles T. Connell.)

to, and certainly, so far as this last question is concerned, I would not permit that question to be answered over objection. The stipulation, then, is withdrawn, Mr. Reporter; that has been referred to.

Mr. DOCKWEILER.—As to the future?

The COURT.—As to the future.

By Mr. DOCKWEILER.—No cross-examination.

[Testimony of Charles E. Kruse, for the Government.]

CHARLES E. KRUSE, a witness called on behalf of the Government, having been first duly sworn, testified as follows: [135]

Direct Examination by Mr. STONE.

My name is Charles E. Kruse. I live at Bakersfield, California. Since June the 12th I have been in the well drilling business. From August, 1911, until June, 1912, I was accountant for the State Banking Department in the Kern Valley Bank in liquidation, and assisting the special deputy also. I know Sam Yick. I was appointed by the court trustee in bankruptcy of his estate. As such trustee I received a small tin box containing papers belonging to Sam Yick; there were some letters in that box which I delivered to Mr. Connell. When I received the box it was locked and the key was tied to a little handle with a string; the key and box were delivered to me. I don't know whether the box contained any papers except those belonging to Sam Yick. All the papers in it were in Chinese consisting of accounts and books and different kinds of papers and letters.

(Testimony of Charles E. Kruse.)

I marked the letters that I took from this box with my name or initial.

Q. (By Mr. STONE.) Will you go through that list and those that you are able to identify, will you lay them out here on the desk? (Handing a bunch of papers to witness.) First, I will ask you to examine this instrument (handing document to witness) and state whether or not you found that in that box. A. Yes, sir.

Mr. STONE.—We offer this (document last mentioned) in evidence, if your Honor please, as Government's Exhibit No. 11.

(The document last mentioned was received in evidence and filed as U. S. Exhibit No. 11, and was read to the jury, and is as follows:)

**[United States Exhibit No. 11—Receipt Dated
Bakersfield, September 27, 1911, E. P. Morse to
Sam Yick.]**

“Department of Commerce and Labor,
Bakersfield, Cal., Sept. 27, 1911.

Received from Sam Yick \$60.00, this money to be sent to Inspector Bernard at San Diego, Cal., for the purpose of obtaining the release of the three Chinese now under arrest there and for their return to Mexico or if this is not possible it is [136] understood that the money is to be returned to Sam Yick. This money was delivered by Chang Kim.

E. P. MORSE.”

(Testimony of Charles E. Kruse.)

(Stamped across top of paper with rubber stamp as follows:)

“U. S. Immigration Service
Commerce and Labor,
Received
Sept. 28, 1911
Port of Los Angeles.”

Q. You never saw the duplicate of this or carbon copy of it? A. Not that I know of; no, sir.

Mr. MOTT.—That is the original of the document that was introduced earlier in the trial?

Mr. STONE.—Yes, that was given to Jung Kim.

A. (Answer by witness.) It will take me a little time to go through this and make sure.

By Mr. STONE.—Yes, take your time and get those that you got out of this box.

A. There is an envelope and couple of pictures. The envelope I found, but I can't say about the pictures. They haven't got my name on them.

Mr. DOCKWEILER.—Of course, we don't know the contents of these letters.

Mr. STONE.—I expect to submit them to counsel.

Mr. DOCKWEILER.—We make no objection to the first letter because that was a mere duplicate of the original.

Mr. STONE.—I expect to submit them to counsel.

Mr. DOCKWEILER.—I desire now, your Honor, to make a demand [137] upon the Government of the United States represented here by its attorneys, and to make a demand upon the witness, for all personal effects in the way of papers and writings, not

(Testimony of Charles E. Kruse.)

evidences of indebtedness, not connected therewith, belonging to the defendant Sam Yick. Why, your Honor—

Mr. STONE.—We will readily comply with the demand. You need not argue it.

The COURT.—Probably you do not understand the purport of Mr. Dockweiler's suggestion as I do. He wants them returned absolutely to the possession of the defendant.

Mr. STONE.—I mean for inspections, of course.

Mr. DOCKWEILER.—Oh, no.

Mr. STONE.—Then I do not understand the demand.

The COURT.—The purpose is to deprive you of the use of them as evidence.

Mr. DOCKWEILER.—That is it exactly.

Mr. STONE.—Well, I will not agree to that.

The COURT.—I have seen nothing but newspaper reports of a case decided by the Supreme Court in which a demand for certain papers unlawfully taken from the possession of the defendant was made before the trial and the Supreme Court held that in the absence of that demand there was no basis, that it constituted no ground for reversal. Is that the idea?

The COURT.—Do you want, as far as you can, to comply with that ruling? Is that your idea?

Mr. DOCKWEILER.—Yes, your Honor.

The COURT.—That ruling, I understand, is based on the fact that the papers were taken forcibly from the possession of the defendant. I do not

(Testimony of Charles E. Kruse.)

understand it has any application to a case of this kind, where the papers came into the possession of the witness lawfully.

Q. (By Mr. DOCKWEILER.) By the way, Mr. Witness, what is [138] the status of the bankruptcy proceedings?

A. I have been told by the attorneys for the banking department that I was discharged, although I have never received any official notice from the referee in bankruptcy. I have not done anything with the case for quite a while.

Q. When were the bankruptcy proceedings initiated?

A. Along—I don't remember the exact date—I didn't pay much attention—

Q. Approximately.

A. Approximately the latter part of 1911—October or November. The latter part of the year. I started for the banking department in August, and it was a month or probably two months before I was appointed, and I didn't make any note of the date.

Q. Has the defendant been discharged in bankruptcy? A. That I don't know.

The COURT.—I presume the records of the court will show that.

Q. (By Mr. DOCKWEILER.) The records in that bankruptcy proceeding are on file in the office of this court or at Fresno?

A. No, at Bakersfield.

Q. (By the COURT.) Your connection with it was in Bakersfield?

(Testimony of Charles E. Kruse.)

A. Yes. I don't know anything outside of that.

The COURT.—I don't know of any such case pending here, but the clerk informs me that it was a bankruptcy case.

Do you understand now why that demand is made?

Mr. STONE.—Yes, I understand, your Honor, and I did not mean to be so broad in my statement. I did not mean to be so literal with counsel. I simply wanted to state that he was more than welcome to examine any paper there, but I didn't want to turn it over to him. I think he has no right to them under the Wells case, because I understand your Honor is eminently correct there. [139] It is where the papers were procured unlawfully in the first instance. The case was based upon that document.

Q. (By the COURT.) How about that chest of books containing these papers coming into your possession?

A. I got it from the Sheriff's office. It seems that, as near as I can remember, he was attached before he went into bankruptcy, and the sheriff had charge of all of his effects, his store and everything else, and when I was appointed trustee I got an order, as near as I remember, from the referee in bankruptcy to take charge, and I heard or found out that there was a box that the sheriff's office had gotten out of his little safe in the store and I went over and got that on this order.

Mr. STONE.—I have the Sheriff here, but he is out now, and will connect it up to show how the

(Testimony of Charles E. Kruse.)

papers were gotten; but I haven't offered the papers yet, anyway. The objection came, really, too soon.

The COURT.—Very well; I will allow you to identify the papers and then you can present your question later.

Mr. DOCKWEILER.—I understand from the clerk that there was an involuntary proceeding in bankruptcy.

The COURT.—I don't know what it was. You may get that fact into the record if you want to.

Mr. DOCKWEILER.—Well, Mr. Scott, the clerk, thinks it was an involuntary proceeding; but I don't want to make it more favorable to our side than what the facts would justify.

The COURT.—Now, keep those papers you identify together so that you will not have to go over them again.

(Files in bankruptcy proceeding examined by clerk.)

The WITNESS.—Do you want me to leave those out that I cannot identify?

Mr. STONE.—Yes, those that you cannot identify I want you to leave out. [140]

Mr. DOCKWEILER.—I find this is a voluntary petition in bankruptcy, your Honor, and the defendant was discharged—or, rather, Sam Yick, Tin Sue, Jung Chong and Chung Kee were each of them discharged on May 18, 1912. I note from the papers also that Mr. Kruse filed his final account on November 27, 1912, which final account, after the accounting for receipts and disbursements, shows no

(Testimony of Charles E. Kruse.)

assets still remaining on hand; and Mr. Scott has also shown me the record in the case which recites November 27, 1912, "Trustee C. E. Kruse files his report and final account as trustee showing the amount of money received," etc., and then, "There being no more assets of the estate of said bankrupts, their estate is declared closed and certified copy of proceedings mailed to the clerk of the District Court of the United States, Los Angeles. Thomas Scott, Referee." So that was closed November 27, 1912. Now, Mr. Kruse had no right or authority to take this man's private papers, whatever they may consist of, letters or what not.

The COURT.—I will have these papers (hands papers to witness) identified as far as they can be, and then put in such shape that you can have them with the clerk of the court; it being admitted or stipulated that the witness identifies them here now, if that is satisfactory.

Mr. DOCKWEILER.—Yes.

The COURT.—Then I will hear from you as to their competency when they are offered.

Mr. DOCKWEILER.—Yes.

The WITNESS.—I cannot identify those (handing papers to Mr. Stone).

Q. (By Mr. STONE.) Here is one I have noticed—examine that again (handing paper back to witness).

A. Yes, that is right. [141]

Q. Are these the papers that you can identify as having been taken from the tin box? A. Yes.

(Testimony of Charles E. Kruse.)

The COURT.—Now, those are the papers that this witness identifies as having been taken out of the box he got from the Sheriff. I suggest that they be put in some convenient form and given to the clerk and the clerk may put them in an envelope and seal them and hold them for future reference, unless you want to examine them in the meantime.

Mr. MOTT.—Yes.

The COURT.—You may select those you want to introduce in evidence.

Mr. STONE.—These are the ones (exhibiting papers). I want to identify them a little further.

Q. From whom did you get the box out of which you got these papers?

A. From Mr. Badger, to the best of my recollection.

Q. That is the gentleman sitting back here?

A. Yes, sir. I think he is. I couldn't swear positively.

Q. (By the COURT.) Who was Mr. Badger?

A. The deputy sheriff at that time.

Mr. STONE.—That is all.

Cross-examination, by Mr. DOCKWEILER.

Q. Where have you got the balance of the papers?

A. They are in Bakersfield. I left them in the vault when I left the banking department. The thing was not wound up, and to the best of my knowledge they are still there.

Q. What do the papers consist of—letters, correspondence?

A. Letters, correspondence, and some books, ap-

(Testimony of Charles E. Kruse.)

parently account-books or something, they looked to me like, and things of that kind; papers. The box was chuck full. [142]

Q. Well, aren't those the property of the bankrupts, those papers?

A. I suppose they are, but I have never been notified that I have been discharged, as I have said, and I just left the thing rest along.

Q. I see the record here shows that you were discharged on 27th of November, 1912, and account approved.

A. I have been told that, but I have never received official notice.

Mr. DOCKWEILER.—That is all.

Mr. STONE.—That is all.

Q. (By the COURT.) You were the trustee in bankruptcy, were you, Mr. Kruse? A. Yes.

Q. And these books came to you in the exercise of your office as trustee?

A. Trying to locate some property to get some money on.

Q. You got them from the deputy sheriff?

A. I found them in the sheriff's office and delivered them to Mr. Badger.

[Testimony of C. K. Badger, for the Government.]

C. K. BADGER, a witness called on behalf of the Government, having been first duly sworn, testifies as follows:

Direct Examination, by Mr. STONE.

My name is C. K. Badger. I have lived in Bakers-

(Testimony of C. K. Badger.)

field off and on since 1896. In 1911, I was Chief Deputy Sheriff of Kern County. In my capacity as such Chief Deputy Sheriff, sometime in September, October or November, 1911, I levied an attachment on Sam Yick's store in the case of McDonald vs. Sam Yick, and in levying that attachment I came into possession of a black square box, an ordinary treasury box; the box had letters and accounts and various articles in it, which I didn't examine closely, and some money. [143] I locked all these things up and took them to the sheriff's office. I opened the box but left all the papers in it that I found in it. I held it at the sheriff's office for probably six weeks and turned it over to Mr. Kruse when he was appointed trustee. It seems to me that when Mr. Kruse was appointed trustee of the bankrupt estate, he presented to me an order for this box and I took his receipt and turned it over to him.

It seems to me that it was in September or October, 1911; at any rate, as soon as the attachment was levied I took this box out of Sam Yick's store on Eighteenth Street. Neither Sam Yick nor anybody representing him ever made a demand on me for the return of it.

Cross-examination, by Mr. DOCKWEILER.

I took possession of this box containing these papers under and by virtue of my authority as deputy sheriff and in pursuance of the command of the writ of attachment against Sam Yick; and when I turned this box, containing these papers, over to Mr. Kruse, I did so in compliance with an order

(Testimony of A. G. Bernard.)

made upon me by Mr. Kruse, as trustee in bankruptcy in the Sam Yick matter in the performance of my duty as an officer of the law.

(Here, after some discussion, the papers taken out of the tin box and identified by Mr. Kruse were handed to the clerk of the court and marked U. S. Exhibit No. 12-A, 12-B, *et cetera*, a letter of the alphabet being appended to each document after the No. 12 for the purposes of identification; and it was stipulated that these letters might be taken by counsel for the defendants for the purpose of examination, to be returned later on to the United States District Attorney and the clerk of the court.

**[Testimony of Edward P. Morse for the Government
(Recalled—Cross-examination).]**

EDWARD P. MORSE, being called for further cross-examination, testified as follows:

Cross-examination (Resumed [144] by Mr.
DOCKWEILER.

Q. Mr. Morse, did you, or did you not, on October the 14th, 1911, or about that time, at the residence or store of the defendant Sam Yick, at Bakersfield, Kern County, California, at the hour of about seven o'clock in the morning thereof, receive from Sam Yick and his wife, or either of them, the sum of one hundred dollars which you asked for as a loan?

A. No, sir, I did not; neither that time nor any other time.

**[Testimony of Charles E. Kruse for the Government
(Recalled).]**

CHARLES E. KRUSE, a witness recalled on behalf of the Government, testified as follows:

Direct Examination, by Mr. STONE.

Q. I wish you would examine this letter and state whether or not that is one of the letters taken from the defendant's box (handing letter to witness).

A. Yes, sir; it is.

Mr. STONE.—That is all. This is offered in evidence.

(The letter last above referred to was filed as U. S. Exhibit 12-M for identification.)

Cross-examination, by Mr. DOCKWEILER.

At the time I received the box containing these letters from the sheriff of Kern County, I had an order from the referee in bankruptcy to get the box and I made a demand upon the sheriff of Kern County for the same, not as an individual, but as trustee in bankruptcy in the matter of Sam Yick.

Q. At whose suggestion or in what manner did it occur to you that you send to the immigration office private papers not belonging to the assets of the estate, and belonging to the defendant? [145]

A. I can explain that.

The COURT.—Just explain it.

A. It was reported around after I had taken charge of the store, or the merchandise that was in it—I tried to locate some real property and couldn't find anything on the records in the recording office, and it was reported around generally that Sam Yick

(Testimony of Charles E. Kruse.)

was pretty well fixed, and when I got this box there were a lot of papers in there, and books like—they looked like accounts, and one thing and another—and I thought there might be something in that, all in Chinese characters, that would give me a line on some real property or something that I could get at and get some money on. I couldn't find anybody to interpret them around Bakersfield that I knew of, and I had heard then about the immigration officer being there, and I got acquainted with him; I understood he had an interpreter, and I asked him if he would, the next time there was an interpreter in town, let him come over to the bank where I was and look over those papers and see if I could locate anything in the line of property or values that I could get any money out of, and he did that and ran across these letters.

Q. How did you submit the papers?

A. Charlie Levy, I believe was the interpreter's name.

Q. Charlie Levy?

A. I think that was the name; a Chinaman.

Q. Where did he live?

A. I don't know. He came from Los Angeles, I think.

Q. He belonged to the immigration service?

A. Yes. He was from up in Connell's office, I think.

Q. And didn't he examine the papers at Bakersfield?

A. Yes, sir, right in the bank, under my super-

(Testimony of Charles E. Kruse.)

vision. They never left my hands at all. He stood right at the desk and— [146]

Q. And after examining the papers what became of them next following?

A. I kept them and put them right back in the tin box and locked it up and put it back in the vault.

Q. Have you always kept them?

A. No, sir. After that I had a subpoena issued on me from the district attorney's office to bring certain paper down, or a whole bunch of them, and I brought a whole lot of those letters down and they told me to go up to Connell's office, and they picked out certain letters and had me mark them and number them, and they took them away from me and kept them.

Q. Now, you had a subpoena issued. Where is that subpoena? A. Oh, I don't know now.

Q. Was it a grand jury subpoena?

A. I don't remember. I was ordered to come.—

Q. Have you got the paper?

A. I don't think so. That is over two years ago. I may have it.

Q. Or was it a mere request or letter from the district attorney's office?

A. No, it was an order to come down here, as near as I know or remember.

Q. How long ago was that order issued?

A. That was I think in the latter part of November or December, 1911.

Q. And you came down? A. I did.

Q. And what papers did you bring down?

(Testimony of Charles E. Kruse.)

A. I brought down quite a few letters and other papers.

Q. Other papers besides those that have been handled here in the courtroom by you?

A. Yes, there were some others there that I took back with [147] me and put back in the box.

Q. After getting here what did you do with the papers? A. What papers?

Q. The papers that you brought down. You didn't take them all back?

A. I took them all to Mr. Connell's office.

Q. And then did you leave them? A. I did.

Q. How many papers did you leave at Connell's office?

A. I don't remember that. Eleven or twelve or something like that.

Q. By virtue of what demand or by virtue of what right did Mr. Connell claim to you that he had a right to retain private papers belonging to somebody else that temporarily happened to be in your custody?

A. Well, I don't know as he mentioned any right. I suppose that the district attorney's office ordered me to go up there with those papers and to deliver them to Connell, as near as I remember, what he wanted of them. I supposed that was enough; I didn't make any inquiry at all.

Q. Now, you say you supposed. Did the district attorney tell you to do that or did he not? Or did you, as a matter of fact, through convenience, and for the purposes of accommodation, leave the papers with the immigration office?

(Testimony of Charles E. Kruse.)

A. No, I was under the impression that they were entitled to them. I didn't do it for any matter of accommodation or anything like that.

Q. Then, as I understand, whatever papers you left with the immigration officer you did so by virtue of the command of superior authority in the person, as you understood it, of a representative of the district attorney's office? A. Yes, sir. [148]

Q. The United States Attorney's office?

A. Yes, sir; that was my understanding, absolutely.

Q. Had this demand not been made upon you, you still would have retained the papers?

Mr. STONE.—We object to any further examination on that. It is a collateral matter, and it is a question of law as to the competency of these letters.

The COURT.—Well, I will not limit the cross-examination, although he seems to have elicited already all the facts with reference to that matter. Go on.

(Last question read.)

The COURT.—Answer the question.

A. I think so, yes.

Q. You still have some papers in your possession belonging to the defendants?

A. Well, they are in the possession of the banking department; I haven't them; because they have a vault to take care of them and I have no place to keep them. I have not been in the banking department since June, 1912.

Q. They are in the possession of the bank examiner? A. The state banking department.

(Testimony of Charles E. Kruse.)

Q. Have you any connection with the State bank examiner?

A. Not at present, no. I just left them there for safe keeping.

Q. Then they are under your control?

A. As far as I know, yes.

Q. Will you please redeliver those to the defendant whatever papers you have belonging to him?

A. I will if it is proper.

After the witness, Kruse, was excused the following took place.

By Mr. MOTT.—The translation of these letters is substantially [149] correct (referring to letters proposed to be offered by the Government) and we will stipulate that with the exception of letter 14—there is one there in which the father should be added and a son should be added.

Mr. STONE.—That is the one that you called my attention to yesterday. I will stipulate to that. We offer in evidence one of the letters dated April 13, 1911.

Mr. DOCKWEILER.—Now, it is understood, your Honor, that the demand made by us the other day for all these letters still persists and we still insist upon it.

The COURT.—I understand that to be the case.

Mr. DOCKWEILER.—And that counsel for the Government turn over to the defendant those letters in his possession which we claim went into the possession of the district attorney through unreasonable and unlawful methods.

(Testimony of Charles E. Kruse.)

(Here there was discussion between Court and counsel as to the admissibility of the letters.)

It was stipulated between counsel for the Government and counsel for the defendants that the writ of attachment under and by virtue of which the sheriff of Kern County seized the box containing all of these letters, was the regular form of writ of attachment in use in the Superior Court of the various counties throughout the state of California. The writ reads as follows:

*In the Superior Court of the State of California, in
and for the County of Los Angeles.*

_____,

Plaintiff,

vs.

_____,

Defendant.

Writ of Attachment.

The People of the State of California to the Sheriff
of the County of Los Angeles, Greeting:

Whereas, the above-entitled action was commenced in the Superior Court of the County of Los Angeles by the plaintiff in the said action to recover from the Defendant _____ in said action the sum of _____ Dollars, _____ of the United States, besides, interest at the [150] rate of _____ per cent, per _____ from the _____ day of _____, 191—, and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law.

(Testimony of Charles E. Kruse.)

Now, we do therefore command you, the said Sheriff, that you attach and safely keep all property of the said defendant ——— within your said County not exempt from execution, or so much thereof as may be sufficient to satisfy the said Plaintiff's demand, as above mentioned, unless the said defendant give you security, by an undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking, and hereof make due and legal service and return.

Witness Honorable ———, Judge of the Superior Court, this ———, day of ———, 191—.

Attest my hand and the seal of said Court, the day and year last above written.

_____,
Clerk,
By _____,
Deputy.

It was stipulated that the above form of writ be a part of the record in this case.

By Mr. STONE. Now, we want to offer this letter in evidence dated the third month, sixteenth day—it doesn't show the year.

(Referring to U. S. Exhibit 12-M for identification.)

Mr. DOCKWEILER.—We object to the introduction in evidence of this document on the ground that the same is incompetent, irrelevant and immaterial,

(Testimony of Charles E. Kruse.)

and no foundation laid therefor, and that it is purely hearsay. Here is a letter addressed apparently to Mr. Deang Coy, signed by Quan Ching Lim; that is the opening or beginning of the letter is to Mr. Deang Coy, and it is signed Quan Ching Lim, and, at the end is the following writing: "To Sam Yick Company, Riverside, third month, sixteenth day" There is nothing upon the face of this document whatever which would indicate any connection with the charge referred to in the indictment.

(Here there followed further argument between Court and counsel on the question of the demand by the defendants for the return of all the papers taken by the Government from Mr. Kruse, trustee in bankruptcy.)

It was stipulated between counsel for the Government and [151] counsel for the defendants that the writ of attachment under which these papers were seized by the sheriff of Kern County, was issued in a case in which one McDonald was plaintiff, and the defendant, Sam Yick, personally, was a defendant.)

The COURT.—Now, as to the demand for the restoration of the papers, that is refused.

Mr. DOCKWEILER.—To which we except.

The COURT.—Now, you are ready for the specific objection, is that in order now?

Mr. DOCKWEILER.—Yes.

The COURT.—Are these translations the same?

Mr. STONE.—Yes, they are duplicates. That is all.

The COURT.—This is dated April 13, 1911.

(Testimony of Charles E. Kruse.)

Mr. DOCKWEILER.—Now, your Honor, it is not in evidence that the Deang Coy name in this letter and to whom the letter was sent and addressed was the defendant Sam Yick or the defendant Jung Kim.

The COURT.—That is not the theory on which it is put in. It is put in on the theory *sole* that it was found in the possession of the defendant.

Mr. STONE.—If your Honor will permit, I can make my contention so that Mr. Dockweiler may then be in a position to better understand our view of it. In a conversation which Sam Yick had with Mr. Morse on May the 8th, 1911, it was stated that he (Sam Yick) then had letters which related to fixing certificates. Our next point is that the letter says to deliver to Sam Yick Company and the letters were found intact in Sam Yick's private box. The letter corroborates Mr. Morse in that he says Sam Yick told him that he had letters from Chinese in Mexico that wanted to come in. It is part of the common design and scheme charged in the indictment, and which we are attempting to show.

Mr. DOCKWEILER.—Now, there is nothing in the record indicating [152] that he (Sam Yick) had any communication at that time from Ensenada, Mexico, or from any point in Lower California, from which it is claimed that these Chinamen came. Now, here is a letter, your Honor,—it is immaterial, so far as we are concerned, whether it was found among the papers of this store when it was attached, or among the papers of Sam Yick—here is a letter upon

(Testimony of Charles E. Kruse.)

the face of it written to Deang Coy, who is absolutely unknown to this record. Until this morning we never heard of it. He writes a letter to Deang Coy, an entirely different personage from these defendants. Who knows but that these papers were turned over to Sam Yick later on by Deang Coy and Deang Coy had been guilty of some criminal conduct or some offense or contemplated offense against the United States. Because somebody else does something can our defendant in this case be successfully prosecuted upon evidence made by other people?

(Citing authorities.)

The COURT.—Yes, an anonymous letter does not attach any guilt to the defendant. But that is quite different from this case. It is not an unfair inference that this letter deals with matters involved at the present trial, and the possession of the letter by the defendant connects him sufficiently with it to make it competent. That is the view I take of it.

Mr. DOCKWEILER.—(Citing from authorities.) Here is a letter written in April. The conversation with Mr. Morse was in May. There is no evidence offered by the Government as to when Sam Yick secured these letters. This particular letter, written by some man disconnected with this trial, never referred to herein, to a man entirely different from any of the defendants herein, might have been secured or given for safe keeping, or turned over to Sam Yick, say in October. It might have been turned over to him a day before the attachment. Shall the presumption of date and the probability of receipt apply

(Testimony of Charles E. Kruse.)

to Sam Yick, when Sam Yick [153], was not the addressee even of the letter. * * * Why has not the Government made effort to determine who the writer is and who the addressee of the letter was, and from what point the letter was transmitted. If it had been transmitted from Juraez, then, probably, as your Honor suggests, it might be appropriate as connecting up the conversation with Morse, that he had letters from Juarez. Nowhere does it appear, your Honor, that Sam Yick had letters from Lower California, from Ensenada or from Tia Juana. Now, the mere fact that subsequently he received those letters, cannot be used to strengthen the statement of Morse. As I understand, these letters are introduced for the purpose of illustrating the truth of Morse's testimony.

Mr. STONE.—Yes.

Mr. DOCKWEILER.—As to when Sam Yick received this letter, no inference can be indulged in as to receipt in due course of mail. Can it be said that the Government should be permitted to use a letter of this kind in substantiation of the theory of corroboration when the letter is otherwise unconnected with the defendant except by the fact that it was discovered in a box belonging to the defendant, that box being secured in November, 1911, the letter having been apparently written in April, 1911 * * * ? The Government in order to introduce that letter must show by some evidence that that letter was in the possession of Sam Yick at the time or about the time when he talked to Morse; and unless the Gov-

ernment shows that directly or by fair inference, that letter is incompetent; and no inference can be drawn from the date of the letter, because that letter not being addressed to Sam Yick, there is no presumption that Sam Yick received it soon after April 16, 1911, or before his talk with Morse in May.

Mr. STONE.—We take the position then that the objection to these letters on the part of counsel goes to the weight of this evidence and not to its admissibility, that their objection [154] is all to the weight and not to the admissibility of the evidence. It is for the jury to say. After Mr. Morse has testified that “Sam Yick said to me, ‘I have got people down there; I have had letters from them,’” and after these letters were found in his possession, showing a date previous to the time he had the conversation, it shows that Sam Yick himself made the advance, for long previous to the conversation Sam Yick had knowledge of Chinese smuggling.

The COURT.—(Examining letter:) I think this letter is competent for the reasons already indicated, that it certainly goes to corroborate the testimony of Morse as to the conversation that he had with Sam Yick, and also it throws light upon the issue as to whether or not the first approach in regard to the smuggling came from Sam Yick or Morse. The letter, of course, does not prove the truth of the statements contained in it, but it is only admissible in so far as it tends to show the knowledge that Sam Yick had, confirming the statements that he made to

Morse. I shall overrule the objection to the competency of this letter.

Mr. DOCKWEILER.—Exception.

(Here followed some further argument as to the admissibility of the letter.)

The COURT.—I will overrule the objection.

Mr. DOCKWEILER.—Exception. Now, as each letter is offered I suppose we will have to make an objection.

The COURT.—Did you want to interpose an objection to each one?

Mr. DOCKWEILER.—Yes.

Mr. STONE.—We can stipulate the same to each and every one if you wish.

The COURT.—Probably it would be best to follow each letter up with an objection.

Mr. STONE.—I will renew the offer of the letter dated April 13, 1911. [155]

The COURT.—Yes. It has been objected to and the objection is overruled.

Mr. DOCKWEILER.—I want my objection to go severally, on behalf of each defendant, your Honor. I would like to have that understood. I am afraid I said, "The defendants object." Each of them severally objects. The defendants and each of them object to the introduction of the letter on the grounds heretofore stated.

The COURT.—Very well.

Here the letter last above mentioned was filed as U. S. Exhibit 12-J, and was read to the jury, and is as follows:

**[United States Exhibit No. 12-J—Letter from Quan
Ching Lim to Deang Coy.]**

“Mr. Deang Coy :

This day I received a letter from Jung Qwoon Toh of Ensenada, saying that there is a countryman at your place who desires to come to the United States, and his name is Deang Jock Toh. He states also that you are willing to issue for him a letter of guaranty for his expenses. We know not whether that is true. If so, please notify me at once, and have the letter of guaranty ready, then I get him started immediately, and guarantee to get him to your place.

It seems that it is extremely dangerous at this time, wouldn't you prefer have him taken direct to San Francisco, as that will be better, and prevent from getting into their hands. Our company do not wish to see any of our countrymen being caught by the immigration officers. First, a lot of money being wasted; second, lost so much time and suffer a great deal of inconvenience. On your receipt of this letter, please think this matter over, and hope that you will consent to do as I proposed.

Please try to find a reliable store in San Francisco, and have them arrange the letter of guaranty with Fong Yeuk Jew of Sung Chung Lung store, then we can act at once. The price is \$435.00. If it was for other people, our company would ask the full amount of \$450.00. So you see we are making this little reduction just to accommodate you.

Please write and let us know what you will do.

Address your letter according to the one given you in English in this letter: Kwong Lun Sing, P. O. Box 1195, Riverside Calif.

(Signed) QUAN CHING LIM.

To Sam Yick Company, Riverside, 3rd month, 16th day.

Apr. 13, 1911.

I hereby certify that the above is a correct translation of the letter written in Chinese, marked #10, *Kluse*.

LEE PARK LIM,

Chinese Interpreter." [156]

Mr. STONE.—I next offer in evidence the letter which has been marked for identification as U. S. Exhibit 12—L.

The COURT.—The Chinese original, I understand, is attached to the translation and you will read the letter.

Mr. STONE.—Yes, I am reading the translation. I understand we have stipulated as to the correctness of the translation, except perhaps in one or two instances, which, if counsel will call my attention to, I will stipulate further concerning.

Mr. DOCKWEILER.—I will form a stipulation now that can be entered as to each of them.

Mr. STONE.—Yes.

Mr. DOCKWEILER.—Defendants and each of them object to the introduction of the proposed letter upon the ground that the same is incompetent, irrelevant and immaterial, and no proper foundation

therefor has been laid; and upon the further ground that the letters appear to be addressed to a party other than either of the defendants in this case, and by party named Deang Jock Toh, who is also unconnected so far as the record is concerned with either of the defendants or with any of the three Chinamen named in the indictment as having been assisted over; and upon the further ground that the letter as to each of the defendants, is hearsay.

The COURT.—One of the letters is addressed to the Sam Yick Company, is it not?

Mr. DOCKWEILER.—It is addressed to the Sam Yick Company in Riverside.

The COURT.—Well, that last objection, of course, could only apply to this first letter because he is not specifically named as addressee.

Mr. DOCKWEILER.—Yes.

The COURT.—The objection is overruled.

Mr. DOCKWEILER.—Exception. [157]

The COURT.—Now, that is the second letter. What objection do you wish to make to the second?

Mr. DOCKWEILER.—That is the second? We have already interposed our objection to the other.

(Here the letter in question was received in evidence and filed as U. S. Exhibit No. 12-L, and read to the jury by Mr. Stone, and is as follows:)

**[United States Exhibit No. 12-L—Letter from Jock
Toh to Jock Coy.]**

“Brother Jock Coy:

It has been several years since we have parted from each other. I hope this will find you prosperous and have made plenty of money.

I have heard that there is a man from the Yin Ping District, named Ngaw Doy Wong, his marriage name is Jung Kwoon Toh, who says that So Sam Lin has the safest method in smuggling people over. So I want you to write a letter of guaranty at once, for I believe that I will have opportunity to go on the next trip. Delay might mean that I could not go with him when he comes back, and need more money for subsistence, and not able to get a letter of guaranty for my expenses.

My older brother has arrived at Ensenada on the 10th day of the 3rd month. You need not worry about him.

Jung Kwoon Toh says that Sam Lin is an experienced man, and has been in the smuggling business for the past thirty years.

On your receipt of this letter, answer immediately, so I will not have to wait. I would like to borrow \$15.00 American money from you for subsistence.

(Signed) **JOCK TOH.**

Stamped—**DEANG JOCK TOH.**

Dated Sun. 3rd month, 10th day (April 7, 1911).

I hereby certify that the above is a correct transla-

tion of the letter written in Chinese marked; #13, *Kluse*.

LEE PARK LIM,
Chinese Interpreter."

The COURT.—When is that supposed to have been written?

Mr. STONE.—It does not give the address at all.

The COURT.—And there is no envelope accompanying it?

Mr. STONE.—No envelope at all. [158]

Mr. STONE.—I next offer in evidence letter marked U. S. Exhibit 12-K, which I will read.

Mr. DOCKWEILER.—Defendants and each of them object to the introduction of the letter now offered by the district attorney upon the ground that the same is incompetent, irrelevant and immaterial, no proper foundation having been laid therefor, and that it is hearsay; and upon the further ground that the letter appears to be addressed to Jock Coy by the man by the name of Deang Jock Toh, neither of whom are connected with this case in any way.

The COURT.—Is this offered for the same purposes as the first and second letters?

Mr. STONE.—Yes.

The COURT.—In that it refers to one Chinaman that wants to come over. Is that the idea in this second letter?

Mr. STONE.—Yes.

The COURT.—Very well. The objection is overruled.

Mr. DOCKWEILER.—Exception.

(Here the letter referred to was received in evidence and filed as U. S. Exhibit No. 12-K, and read to the jury by Mr. Stone, and is as follows:)

**[United States Exhibit No. 12-K—Letter from
Deang Jock Toh to Jock Coy.]**

“Brother Jock Coy:

I hope that this will find you well and prosperous, and successful in all your undertakings.

On the 10th of the third month I arrived at Ensenada, and went to live in one of the small houses near the Quong Shing Lung store. While living there I have investigated and inquired of the Chinese people here about the Quong Shing Lung store. They told me that that store has no way of getting people away. They have of our countrymen in their place, have been awaiting for the last six or seven months, still they could not send them away.

Yesterday I found out from Ngan Doy Wong and Jung Qwoon Toh that there is a man named So Mun Guey who can undertake to guarantee one over. He has Quan Ting (Ching) Lim of Los Angeles to take care of his men. On your receipt of this letter please try to locate Mr. Quan Ting Lim and consult with him. Give the letter of guaranty to him, then I can reach your place without difficulty. Furthermore, the Quong Lun Shing store of Riverside had had some men started from his place for Bakersfield. At present I heard that they are making strict inspections for certificates, and now they are going to

San Francisco, the price is \$450.00, if to Bakersfield, \$400. [159]

On your receipt of this ——— letter of guaranty, so as to enable me to start. Also send me some money for food, and should you have the letter of guaranty ready, be sure and send me \$20 or more in gold, then I will start at once. Be sure and give this matter your attention, and get me over to your place, then I and my family shall be grateful to you.

Please answer this letter. Should you send me any money please send it to the address given you, that will reach me with—difficulty.

Stamped—DEANG JOCK TOH.

Dated Sun Ho i 3rd month, 17th day (April 14, 1911).

I hereby certify that the above is a correct translation of the letter written in Chinese marked: #12, *Kluse*.

LEE PUNK LIM,
Chinese Interpreter.

Mr. STONE.—I next offer in evidence as U. S. Exhibit No. 12-L, letter dated June 4, 1911, addressed to Sam Yick Kee Company, Postoffice Box 363, Bakersfield, Cal., U. S. A.; that is the address on the envelope.

Mr. MOTT.—That is the letter that should have “father” accompanying the name of the person it is addressed to, Jock Coy. It should read “Jock Coy, father” and right after that at the bottom of the letter “awaiting your reply, your son.” (The letter was accordingly amended by Mr. Stone.)

Mr. DOCKWEILER.—We object to the introduction in evidence of this proposed letter as incompetent, irrelevant and immaterial, no proper foundation laid therefor, and on the ground that it is hearsay; and upon the further ground that it appears to have been addressed to a man by the name of Jock Coy and signed by a man by the name of Jung Foo Yung, and then the envelope being marked "Please deliver to Deang Jock Toh." neither of the parties named in the letter being in any way connected with the defendants in this case or with the parties named in the indictment, those parties being Dock Yook, See Chew and Wah Sing.

The COURT.—There seems to be some difference in the date. That was in June.

Mr. STONE.—Yes. June 14, 1911. The interview with Mr. Morse testified to, was May 8, 1911.

The COURT.—This letter seems to have been dated after that.

Mr. STONE.—Yes, of course, the transactions continued on [160] until away after the dates alleged in these letters. This is addressed to Sam Yick at Bakersfield. The interviews between Sam Yick and Morse extended to May the 8th to September. These papers are offered for the purpose of showing his (Sam Yick's) guilty knowledge of his scheme or design to smuggle Chinese in. It was offered for that further purpose this morning, and is offered now for the purpose of showing guilty knowledge of the plan or scheme which was talked over between him and Morse. Not merely in corroboration of

Morse's testimony as to which made the approach about the smuggling, but as showing the participation of this defendant in it and his guilty knowledge of the plan and design of smuggling.

The COURT.—The objection is overruled.

Mr. DOCKWEILER.—Exception.

(Here the letter referred to was received in evidence and filed as U. S. Exhibit No. 12-I, read to the jury by Mr. Stone, and is as follows:)

[United States Exhibit No. 12-I—Letter from Jeung Foo On to Jock Coy.]

Jock Coy Father:

I sent you a letter some time ago, and presume that you have received it ere this time.

I am sending you now six photographs. Kindly see that you receive same. I had to borrow the money from my tribal cousins here, in order to have those photographs made. I have not a cent in my possession, besides owing people here for my board and other expenses. On your receipt of this letter, please try to send me some money in order to pay for my urgent needs. Please do not delay. My height is about 5 ft. 5½ in., that was taken at Hong Kong. You can use those photographs for making out my papers.

There is a tribal cousin here who also would like to have a paper made for him to enable him to come over. Please advise me what will be the price of merchant's paper and native born paper, and guarantee a person safely over to the United States, and go by what route. Please tell me all about it.

This man I have reference to belongs to Hoi Ping district, and his name is Jeung Shi Poy, age about 20 years or more. I believe that he is little too old for to get a native born paper. His uncle is at Los Angeles, in the Wah Mee Company, and his name is Jeung Yik Tong, this is for your information.

I am waiting for your reply.

Your Son.

Stamped—JEUNG FOO ON.

Dated Sun Ho i 5th month, 9th day (June 4th, 1911).

Addressed on envelope: Please deliver to Deang Jock Coy.

I hereby certify that the above are correct translations of the letter and envelope written in Chinese marked: #14, *Kluse*.

LEE PARK LIM,

Chinese Interpreter. [161]

Mr. DOCKWEILER.—Your Honor will observe this letter purports to come from Sonora. That is a new point geographically. As I remember Morse's statements, he referred to the fact that Sam Yick had photographs of men in Ensenada and Lower California. Here is a letter from Sonora, Mexico. That is a good many hundred miles off.

The COURT.—The objection is overruled.

Mr. DOCKWEILER.—Exception.

Mr. STONE.—I next offer in evidence letter dated June 1, 1911, marked U. S. Exhibit No. 12-D.

Mr. DOCKWEILER.—We make the same objection.

The COURT.—Same ruling.

Mr. DOCKWEILER.—Exception. It will be understood that so far as names are concerned the names referred to in the letter will be the names in the objection.

Mr. STONE.—It is so stipulated.

(Here the letter referred to was received in evidence and filed as U. S. Exhibit No. 12-D, and read to the jury by Mr. Stone, and is as follows:)

**[United States Exhibit No. 12-D—Letter from
Jeung Jeuck Bing to Jock Gim and Jock Coy.]**

“Friends Jock Gim and Jock Coy:

My son Foo On has nothing to do in Mexico at the present time. I hope that you two will try your best to get Foo On over to the United States, thus my *entirely* family shall be grateful to you. Formerly, the time when he went to Mexico, he did not have enough money, had to borrow \$200 from Yim Bing of the same village, for steamship fare. I am here at home in the village, have *now* way to borrow. I wish that you would send me \$200, so that I could repay him and settle this account. Wait until later I shall repay you in full.

(Signed) JEUNG JEUCK BING.

Dated Sun Ho i first part of the 5th month (1st part of June 1911).

I hereby certify that the above is a correct translation of the letter written in Chinese marked: #6 *Kluse*.

LEE PARK LIM,
Chinese Interpreter.” [162]

Mr. STONE.—I next offer in evidence letter dated June 13, 1911, which is marked U. S. Exhibit No. 12-H.

Mr. DOCKWEILER.—Same objection. It is stipulated that my objection in referring to names shall cover the names mentioned in the particular letter.

The COURT.—Very well. Same ruling.

Mr. DOCKWEILER.—Exception.

(Here the letter referred to was received in evidence and filed as U. S. Exhibit No. 12-H, and read to the jury by Mr. Stone, and is as follows:)

**[United States Exhibit No. 12-H—Letter from
Deang Jock Toh to Jock Coy.]**

Brother Jock Coy:

Your letter is at hand, and contents of which understood. In your letter you stated that what money I owe for board will be paid them at the same time when you pay them the money for getting me over to your place. But I have no clothing and the pair of shoes that I have brought with me from Hong Kong have worn out. On your receipt of this letter please send some money to me for buying clothes before I can start from here.

Sometime ago Wong Shi Chu sent \$25.00 here through the Sam Tung Kee store, which is same as Quan Ting Lim's place.

You will have to write down specifically, when I get to San Francisco, to stay in which store I have been here for a long time and I should get started.

Just when I shall start, I will write and inform you beforehand. In regard to sending letter home, I will wait until after I had crossed before doing so. I believe they still have enough money home for subsistence.

All our countrymen here owing board bills are not permitted to leave. They had to settle all bills before they can start. It is not my case only, but the same in every store.

Stamped—DEANG JOCK TOH.

Dated Sun Ho i, 5th month, 18th day (June 13, 1911).

I hereby certify that the above is a correct translation of the letter written in Chinese marked: #7 Kluse.

LEE PINK LIM,

Chinese Interpreter. [163]

Mr. STONE.—I next offer in evidence letter dated September 2, 1911, addressed on the envelope, "Sam Yick, Bakersfield, Cal.," and identified as U. S. Exhibit No. 12-M.

Mr. DOCKWEILER.—Same objection and same stipulation as to change of name.

Mr. STONE.—Yes.

The COURT.—The objection is overruled.

Mr. DOCKWEILER.—Exception.

(Here the letter referred to was received in evidence and filed as U. S. Exhibit No. 12-M, and read to the jury by Mr. Stone, and is as follows:)

[United States Exhibit No. 12-M—Letter from
Deang Jock Toh to Jock Coy.]

“Brother Jock Coy:

Your letter is at hand and contents of *whcih* fully understood. Several others and I will come the way as you directed. But there are over three hundred soldiers left from this place for Tia Juana, where to expect to fight. On that account we are *a* fraid to start at the present time. I have sent word to Deang Chung, and requested him to find out about the soldiers sent there and about the fight. I am waiting for Deang Chung's answer before we will start. For this reason I want to inform you. We wait here a while until we can learn more definitely of what is going on, then will do as you directed us.

I want you to write me and let me know from what part of China is this man Deang Chung from. When you answer this letter, please advise me also whether the immigration officer stations at Oceanside has been bought? I understand that the one stations midway from San Diego is bought. Kindly tell me all about it. I will wait till I hear from Deang Chung and see if everything is safe before we will start, following your direction.

I have received the letter you sent together with a check for \$50. I have turned it over to Sam Lin and he will get it from the Post Office and the same will be delivered to the different parties as instructed in your letter.

Stamped—DEANG JOCK TOH.

From Ensenada.

Dated Sun Hoi, 7th month, 11th day.

(Sept. 2, 1911).

Chinese characters on Registry receipt #2196
8/28/11; Mexico, 7th month, 8th day.

Addressed on envelope: Deliver this to San Yick
Company of Bakersfield.

On the reverse side:

7th month 6th day sent to Mexico.....	\$50.00
Expended for beef.....	.30
“ “ stamps....	.10
“ “ nails.....	.05
“ “ fees for money order....	.18

I hereby certify that the above are correct translations of letter and envelope written in Chinese marked #11, *Kluse*.

LEE PARK LIM.” [164]

Mr. STONE.—I next offer in evidence the letter dated September 3, 1911, addressed to Sam Yick Kee Company at Bakersfield, Cal.

Mr. DOCKWEILER.—Same objection and the same stipulation as to names.

The COURT.—The objection is overruled.

Mr. DOCKWEILER.—Exception.

(Here letter referred to was received in evidence and filed as U. S. Exhibit No. 12-A, and read to the jury by Mr. Stone and is as follows:)

**[United States Exhibit No. 12-A—Letter from
Deang Jock Toh to Jock Coy.]**

Brother Jock Coy:

Your letter is at hand and contents of which fully understood. In your letter you stated about Wong

(Testimony of Charles E. Kruse.)

Shi Chu and I going to Tia Junana, and you will come to San Diego to receive us two men, then go directly to your place. It is perfectly agreeable to me. But you must find a safest course in so doing in order to avoid meeting any difficulty.

The fare to Tia Juana is about \$22.00. . You must let me know where I am to stay while at Tia Juana, and, after getting over to San Diego, where to go, and at what place will you come to meet me. We two men will do what you want us to do and will follow your instructions accordingly.

I still owe the people here my board bill. Please send some money over to me in order to meet this payment, before anything can be done. This is most important.

There is also another man here also from our district, who would like to get across. If you can find a way, my friend and I will come. In sending money do not send it through Sam Lin's place, but get a draft from the bank and send it by registered mail to my address given you in English, that will reach me without difficulty. The man from our district has received words from his friend in San Francisco. His method is also a good method. I know not when he will start, but I shall notify you before hand. He says that he can get his letter of guaranty from the Sam Tung Kee store, such words as that.

On your receipt of this letter, advising me what to do.

(Stamped) DEANG JOCK TOH.

Dated Sun Hoi, 7th month, 12th day (Sept. 3, 1911).

Addressed on envelope: Important letter, for Mr. Deang Jock Gim. The address on said envelope containing the foresaid letter being as follows: Sam Yick Kim Kee Co. Phone Main 113 # P. O. Box 363, 723 18th Street, Bakersfield, Cal.

I hereby certify that the above is a correct translation of the letter and envelope written in Chinese, marked: No. 1 and No. A, *Kluse* respectively.

LEE PARK LIM,

Chinese Interpreter. [165]

Mr. STONE.—I next offer in evidence U. S. Exhibit No. 12-G, seventh month, eleventh day, marked U. S. Exhibit No. 12-G.

Mr. MOTT.—Same objection and same stipulation as to change of name.

Mr. DOCKWEILER.—What is the date of that letter?

Mr. STONE.—The seventh month and eleventh day. It does not give the year, but it refers to one of the Chinese shown to have been brought over as a contraband, Ah Sing, who is on the ticket here and shown to be one of those Chinese.

Mr. DOCKWEILER.—We make the same objection to this letter. It is not dated, your Honor.

(Here it was stipulated that the interpreter might testify as to the date and accordingly the interpreter stated that the date of the letter was September the 2d.)

(Here the letter referred to was received in evidence and filed as U. S. Exhibit No. 12-G, and read to the jury by Mr. Stone, and is as follows:)

**[United States Exhibit No. 12-G—Letter from
Quong You to Jock Coy.]**

“Mr. Jock Coy:

This day I received from you three letters, also a map. You stated in your letter that you want me to join you in the business. I would like to very much.

Jock Toh, Shi Jew and Dock Yoke, the three men had already made arrangement with them, but Ah Sing, I do not know who he is, and have not seen such a man in town, he may not have arrived here yet. I have decided to start next Thursday, the 7th, American Calendar, Chinese the 16th. I have already sent a letter to Deang Chung. You need not worry over this matter. You might make arrangement to meet the vehicle (or train).

Dated Sept. 2/11.

(Signed) QUONQ YOU. 7th month 11th day.

I hereby certify that the above is a correct translation of the letter written in Chinese marked: #8, *Kluse*.

LEE PARK LIM,
Chinese Interpreter.”

Here the Government rested its case in chief.

WITNESSES FOR THE DEFENSE.

[Testimony of F. G. Munger, for Defendants.]

F. G. MUNGER, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is F. G. Munger. I reside in Bakersfield. I am and have been for twenty-two years office superintendent of the Kern County Land Company; I have lived in Bakersfield twenty-seven years. I know the defendant Sam Yick. I have known him for twenty-two years very well. During the time I have been superintendent of the Kern County Land Company I have employed Chinese from Sam Yick, practically all of the Chinamen we employed, and have had a great many other business relations with him, and we have rented our orchards to him and we have done probably one hundred and fifty or two hundred thousand dollars worth of business for Sam Yick. I know Sam Yick's reputation in Bakersfield for truth and veracity, peace and quiet. It is *A1*.

Mr. STONE.—No cross-examination.

[Testimony of E. Weil, for Defendants.]

E. WEIL, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is E. Weil; my occupation is a merchant; I reside in Bakersfield and have resided there for

(Testimony of E. Weil.)

forty-one years; I have a department store there. I have known the defendant Sam Yick about twenty-five years. I know his reputation in Bakersfield for truth and honesty, peace and quiet. It is very good. During all the time I have known Sam Yick I have had business transactions [167] with him, bought goods and farm products from him, and he buys goods from me, and in all my transactions with him, I have found him to be a man of honesty and truth.

Mr. STONE.—No cross-examination.

[Testimony of Arthur Weaver, for Defendants.]

ARTHUR WEAVER, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is Arthur Weaver. I am city tax collector and treasurer of Bakersfield and manager of the Postal Telegraph Company there. I have lived in Bakersfield for twenty-five years, and I have been city tax collector and treasurer for twelve years. I have known Sam Yick about twenty-five years as well as any person could know another in a business way. I have sustained business relations with him in my position as tax collector and in the telegraph office. I know his reputation in Bakersfield for truth and veracity, peace and quiet. It has been very good.

Cross-examination by Mr. STONE.

Sam Yick has gone under no other name, as far

(Testimony of Arthur Weaver.)

as I know; he has been using the telegraph office there since I first came there; to a certain extent he has a kind of headquarters for all Chinamen that come into that country; he had a great many Chinamen around in 1910 and 1911; I don't know anything about any Chinamen working for him having been deported for having no right to be in the country.

[Testimony of Charles A. Bear, for Defendants.]

CHARLES A. BEAR, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT. [168]

My name is Charles A. Bear. I was born and raised in Los Angeles; from Los Angeles I went to Bakersfield and have lived in Bakersfield for about twenty years. I have a drug store there and have had during all that time. I have known the defendant Sam Yick ever since I have been in Bakersfield; he has traded at my store and I have known him constantly for the last twenty years. I know his reputation in Bakersfield for truth and veracity, peace and quiet. It has been very good. He has never been mixed up in anything that I know of. He has always been prompt in paying his bills with us, runs accounts with us, etc., and I never heard of him being in any mix-up.

Cross-examination by Mr. STONE.

I know about Sam Yick having a great many Chinamen working for him. I think he ran an employment office at one time in connection with his

(Testimony of Charles A. Bear.)

store. I do not know that a lot of Chinamen were found there that he had kept there for the last few years that were unlawfully in the country.

Redirect Examination by Mr. MOTT.

My operations are very active in Bakersfield. I am right there under a prominent corner under the Southern Hotel; if any such fact as Sam Yick's having kept a number of Chinamen at his place that were unlawfully in the country had existed, I should have known of it.

[Testimony of Charles H. Sherber, for Defendants.]

CHARLES H. SHERBER, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is Charles H. Sherber. I am a mail carrier. I live at Bakersfield and have lived there for twenty-eight years. I have known Sam Yick during all the time I have lived in Bakersfield. I [169] have done a great deal of business with him. Previous to my being a mail carrier I was with Wells Fargo & Company there twenty-one years. I was agent for them for thirteen years, and I had a good deal of business with Sam Yick; he was a contractor and handling fruit and merchandise and shipments through our office, and I became very well acquainted with his business. His standing in that community was first class, and his reputation there for truth and honesty and peace and quiet was first class in every way.

(Testimony of Charles H. Sherber.)

Cross-examination by Mr. STONE.

I never carried mail to Sam Yick's store. I think the address of the store is 723 *Eighteen* Street; the the name of the store is Sam Yick; there may be other names on the store building in Chinese that I am not familiar with. I think probably Sam Yick has handled more Chinamen than anybody else in that country since he has been there. He has got a postoffice box, but I don't know the number of it.

[Testimony of Francis Colton, for Defendants.]

FRANCIS COLTON, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is Francis Colton. I live in Bakersfield. I have lived there for thirty-nine years. For the last seven years I have been in the dray business; previous to that time I was in the feed and fuel business. I know the defendant Sam Yick very well; I have known him for thirty-one years. The first nine years I was in Bakersfield he was employed by our family, after that I had business with him all the time. I know his reputation in Bakersfield for truth and integrity, peace and quiet; it is good.

Cross-examination by Mr. STONE. [170]

Sam Yick has had charge of a great many Chinamen around Bakersfield. I don't know anything about any of them being contraband Chinese or having no right to be in the country; I saw in the papers that the inspectors had brought away num-

(Testimony of Francis Colton.)

bers of contraband Chinese that Sam Yick had under his control, but I don't know whether it is true or not.

[Testimony of Rowen Irwin, for Defendants.]

ROWEN IRWIN, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is Rowen Irwin. I live in Bakersfield. I am an attorney at law; have been such for about twenty-five years; as such attorney I have never been located at any place except Hanford and Bakersfield. I have practiced law in Bakersfield about eleven years. I am now serving my first term as district attorney of Kern County. I know the defendant Sam Yick but have not had occasion to meet him in my official capacity. Shortly after coming to Bakersfield I was employed by Sam Yick in connection with some contracts that he had involving purchases of fruit and some leases, and different civil business in which he was interested. Since that time I have acted more or less as his attorney on different occasions. I am very well acquainted with him in that way. I know his reputation in Bakersfield for truth and integrity, peace and quiet. It is very good.

Cross-examination by Mr. STONE.

I have always known Sam Yick as a contractor and a man engaged in business affairs of considerable importance. I have examined different contracts that

(Testimony of Rowen Irwin.)

he had wherein he purchased large quantities of fruit, etc.; he took contracts to buy fruit on a large scale and business of that character. I don't know whether he [171] ever ran an employment agency at Bakersfield or not. I do not know anything about his handling a great number of Chinese. I never was at his place of business. I know it was in Chinatown. During the course of my duty as district attorney I had nothing to do with the Chinese smuggling cases or the deportation of Chinese unlawfully in the country.

[Testimony of James Curran, for Defendants.]

JAMES CURRAN, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is James Curran. I live in Bakersfield, and have lived there about thirty-one years. I have been in the brick business since 1887; my occupation is manager of the Bakersfield Sandstone Brick Company. At one time I was Justice of the Peace at Bakersfield. I think I know Sam Yick better than any other Chinaman in Bakersfield. I know his reputation there for truth, integrity, peace and quiet; it is good.

Cross-examination by Mr. STONE.

Sam Yick's business has been the Sam Yick store for a good many years. I am not familiar with the kind of business it is, as far as the merchandise in the store is concerned, but I have bought cordwood

(Testimony of James Curran.)

from him for fuel and have at different times sold him building material. I understood that he furnished Chinese labor in great quantities. I don't know anything about his having contraband Chinese. I don't know anything about such contraband Chinese being taken away from his store by the officers. Just about the time I was subpoenaed from here on this case I heard he was in trouble over the smuggling of Chinese. I never heard his reputation as a smuggler discussed one way or the other. I don't know who furnished the Chinese that worked for the Kern [172] County Land & Cattle Company. I never heard of that company locking the gates of their place so that inspectors could not get in to inspect Chinese brought there by Sam Yick.

Redirect Examination by Mr. DOCKWEILER.

The Kern County Land & Cattle Company owns thousands of acres and have ranches all over Kern County and are engaged principally in raising and feeding cattle and sheep.

[Testimony of D. B. Newell, for Defendants.]

D. B. NEWELL, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is D. B. Newell; my occupation is constable of Kern County in the sixth township in the City of Bakersfield. I have lived in Bakersfield for about fourteen years. Prior to being constable I was on the police force there. I know the defend-

(Testimony of D. B. Newell.)

ant Sam Yick. I know his reputation in Bakersfield for truth and honesty, peace and quiet. It has always been good as far as I have known.

Cross-examination by Mr. STONE.

I never heard of San Yick's reputation for smuggling Chinese until this case came up. I think there were to some extent contraband Chinese in Bakersfield prior to 1911. Sam Yick was a man that the Chinamen looked to for labor throughout the country a good deal. He worked a good many men down there, a kind of contractor; I don't think he had a regular employment bureau. If they wanted Chinamen in the country in any way, they would generally come in and ask Sam Yick about them, though there were others they would go to, too. I never heard any discussion about Sam Yick and the smuggling of contraband Chinese until this case came up. [173]

[Testimony of J. R. Williams, for Defendants.]

J. R. WILLIAMS, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is J. R. Williams. I live in Bakersfield, and have lived there for fifteen years. I am a farmer and am now one of the trustees of Bakersfield. I have known the defendant Sam Yick intimately for the last twelve or fourteen years. His reputation in Bakersfield for truth and honesty, peace and quiet, is good.

(Testimony of J. R. Williams.)

Cross-examination by Mr. STONE.

I have never heard Sam Yick's reputation as a smuggler discussed. I know Sam Yick's store in Bakersfield; he has traded with me; has bought hogs and calves from me a good deal. I don't know anything about any contraband Chinese being in the country there. Part of Sam Yick's business was the running of the employment agency up there for Chinese. I have no idea how many he handled.

[Testimony of Charles H. Quincy, for Defendants.]

CHARLES H. QUINCY, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is Charles H. Quincy. I live in Los Angeles. Previous to coming here I resided in Bakersfield. I left Bakersfield nine years ago. I came to Bakersfield in 1888 and resided there until I came here. I was in the building and plumbing business in Bakersfield, and since coming to Los Angeles I have visited in Bakersfield quite frequently. I still have interests there and go up there five or six times a year. I know Sam Yick and during all the time I was in business in Bakersfield I had business [174] dealings with him his reputation in the community for truth and honesty, peace and quiet, was good.

Cross-examination by Mr. STONE.

As far as I know, Sam Yick's reputation in the past nine years has been good. I think I know his

(Testimony of Charles H. Quincy.)

reputation for the past nine years based upon my being *being* there in Bakersfield and the people I have met and talked to there.

[Testimony of William E. Deacon, for Defendants.]

WILLIAM E. DEACON, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is William E. Deacon. I live in Pasadena. I live in Pasadena at present and have lived there about seven years. Before going to Pasadena I lived in Bakersfield for sixteen years. I know the defendant Sam Yick very well. I have done a great deal of business with him, both in selling him products from my ranch and buying fruit from him and employing labor from him. I have a ranch near Bakersfield and since living in Pasadena I have visited this ranch probably a dozen times a year. Since I have been living in Pasadena I have sold the fruit from my Bakersfield ranch to Sam Yick. I know Sam Yick's reputation in Bakersfield for truth and honesty, peace and quiet; it is good.

Cross-examination by Mr. STONE.

I have sometimes worked Chinamen on my ranch near Bakersfield. I procured the Chinamen through Sam Yick. I don't know anything about these Chinamen being deported. I have never heard of any Chinamen brought into Sam Yick's place that were unlawfully in the country. Ever since 1897, almost every year, I have sold fruit to

(Testimony of William E. Deacon.)

Sam Yick from my ranch, and in 1906, I [175] bought several hundred tons of dried fruit from Sam Yick, to ship. It is generally understood about Bakersfield among business men that Sam Yick is all right, both for the payment of his debts and as to his integrity.

[Testimony of David S. Stern, for Defendants.]

DAVID S. STERN, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is David S. Stern. I live in Los Angeles. I have lived there for seven years. Prior to that time I lived in San Francisco. I have visited Bakersfield every month, sometimes twice a month. I am very well acquainted there. I have been going there for the last nine years. During that time I have become acquainted with Sam Yick. I know him very, very well. I saw him every time I visited Bakersfield. I know his reputation there for truth and honesty, peace and quiet; it is very good.

Mr. STONE.—That is all.

[Testimony of Frank H. Robinson, for Defendants.]

FRANK W. ROBINSON, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is Frank H. Robinson. I have lived in Bakersfield for twenty-three years. I am a banker and in the fire insurance business. I know

(Testimony of Frank W. Robinson.)

Sam Yick quite well. His reputation for truth and honesty, peace and quiet in Bakersfield is good.

Cross-examination by Mr. STONE.

Sam Yick ran an employment agency for Chinese in connection with his store. I never heard him accused of smuggling Chinese until this case came up. [176]

[Testimony of Joseph Morley, for Defendants.]

JOSEPH MORLEY, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is Joseph Morley. I am a rancher and live in Bakersfield. I have lived there for twenty-nine years. I have known Sam Yick very well for twenty-six years. His reputation around Bakersfield for truth and honesty, peace and quiet, is good.

Cross-examination by Mr. STONE.

Sam Yick's business in 1909, 1910 and 1911 was an employment agency. He employed Chinamen going out to work. The Chinamen came from his store.

[Testimony of H. I. Tupman, for Defendants.]

H. I. TUPMAN, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is H. I. Tupman. I live in Bakersfield. I have lived there for twenty-two years. I know

Sam Yick; his reputation in Bakersfield for peace and quiet, truth and honesty, is first class.

[Testimony of James M. Hunter, for Defendants.]

JAMES M. HUNTER, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is James M. Hunter. I live in Los Angeles. I have lived there for eight years and a half. Before coming to Los Angeles I lived in Bakersfield. I have property interests now in Bakersfield, and in the past eight years I have visited Bakersfield frequently and kept in touch with affairs there. I have known the defendant Sam Yick for fifteen or eighteen years. Prior to his starting in the mercantile business in Bakersfield he was [177] a cook in my family, and after that I had several transactions with him, both in renting land to him and loaning him money; his reputation in Bakersfield for truth and honesty, peace and [178] quiet, is very good.

Cross-examination by Mr. STONE.

My knowledge of Sam Yick's reputation in the past eight years is based somewhat on correspondence with him and with his representative regarding loans. His representative discussed Sam Yick's reputation and told me it was good; we were discussing the matter of making a loan.

[Testimony of James E. Anderson, for Defendants.]

JAMES E. ANDERSON, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is James E. Anderson. I live at Burbank, California. I used to live at Wasco, Kern County, about twenty-five miles from Bakersfield. I know the defendant Sam Yick; have known him in a business way for seventeen years. I have never heard anything against his reputation for truth, honesty, peace and quiet, but what his reputation was good.

Cross-examination by Mr. STONE.

I have met Sam Yick on my trips to Bakersfield in the last six or seven years and I have heard his reputation discussed.

[Testimony of Thomas Filben, for Defendants.]

THOMAS FILBEN, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MOTT.

My name is Thomas Filben. I live in Los Angeles. Prior to coming to Los Angeles I lived for a few months in San Francisco. Prior to that time I lived at Wasco, about twenty miles from Bakersfield. While living there I would visit Bakersfield frequently. [179] I have known Sam Yick for about twenty years. For a large part of that time I was secretary of the corporation at Wasco that

(Testimony of Thomas Filben.)

arranged its harvest through Sam Yick Company, and afterwards I arranged my own harvesting through his company and the arrangements for my household, and all that. I knew him well. I had his brother in my house as a domestic servant. I know Sam Yick's reputation in Bakersfield for truth, honesty, peace and quiet; it is good. I am a retired clergyman and was in charge of the Chinese Missions of the Pacific Coast for a year at the time of the San Francisco fire and earthquake, and was then chairman of the Chinese Relief Committee, and during all these times I knew Sam Yick.

Cross-examination by Mr. STONE.

I have a ranch at Bakersfield. I work Chinamen on the ranch when I can get them. I never had any reason to believe that the Chinamen I worked were contraband. I knew nothing at all about the facts in this case. I had to inquire why Sam Yick was in court this morning.

[Testimony of Mrs. Sam Yick, for Defendants.]

Mrs. SAM YICK, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Mr. STONE.—Let the records show that we withdraw our objection to the testimony of this woman on the ground that she is the wife of the defendant.

The COURT.—Very well.

Direct Examination by Mr. DOCKWEILER.

(Witness testifying through interpreter.) My

(Testimony of Mrs. Sam Yick.)

name is Lee Shee. I was born at San Francisco. I am the wife of the defendant Sam Yick. I knew Edward P. Morse October the 14th, 1911, he came [180] to my place on that day and got one hundred dollars in gold. He came about seven o'clock in the morning,—rapped at the door. I opened the door for him. He asked whether my husband was up yet. I told him not and then I woke my husband up, and then Mr. Morse asked my husband for one hundred dollars. My husband got a hundred dollars from me in gold and gave it to Mr. Morse, then Mr. Morse said he had important business and went.

Cross-examination by Mr. STONE.

This was about seven o'clock on the morning of October the 14th, 1911. It was the third year of Sun Hung, that is 1911, the 24th day of the eighth month. (The interpreter, in response to question by Mr. Stone, "that would be October the 14th.") The Southern Pacific Passenger station is about a mile from my house. When Mr. Morse left that morning he went towards the American town, towards the Southern Pacific passenger depot. It was a few minutes before seven that Mr. Morse came; it was past six and before seven; it was between six and seven o'clock; it was nearly seven; any time past six is nearly seven.

[Testimony of Jung Kim, for Defendants.]

JUNG KIM, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

(Testimony of Jung Kim.)

Direct Examination by Mr. DOCKWEILER.

My name is Jung Kim Chung. I was born in San Francisco. I am forty-two years old. I am one of the defendants in this case. On September the 16th, 1911, I knew A. G. Bernard (here at request of counsel Mr. Bernard stands up), the gentleman standing in the courtroom now.

Q. I show you U. S. Exhibit No. 7 in this case, which appears to be some writing in lead pencil upon a Western Union Telegraph Company's blank (handing paper to witness). Please take it and examine it. Having done so state if the handwriting on [181] the paper is your handwriting.

A. Yes, sir. It is my handwriting.

Q. Did you write that on that telegraph blank at your own suggestion or anybody else's, and if so, at whose suggestion?

A. It was suggested to me by Mr. Bernard.

Q. I show you a letter in Chinese introduced in evidence here as Government's Exhibit No. 10, and ask you to examine it and state whether the Chinese characters thereon in lead pencil were made by you.

A. Yes, it is my writing.

Q. Did you write that down there at your own suggestion or at the suggestion of anyone else, and if so, at whose suggestion?

A. This letter was written at the telegraph office, right after the telegraphic message was written. He told me to write to the Chinamen over there and also told me to tell those Chinamen over there that in twenty days' time he will go over and get them back.

(Testimony of Jung Kim.)

And then when I was writing the letter he told me to tell the Chinamen there to destroy the papers and destroy the letter after reading it over. All these suggestions came from him, and I didn't know what it meant by all this suggestion, but I only wrote this upon his dictation. When I finished the writing he took it, and then instead of taking it over to the Chinamen, as he said he would, he put it in his pocket and it is now produced here as evidence against me.

Q. When you refer to "he," who do you mean?

A. Mr. Bernard.

Cross-examination by Mr. STONE.

Mr. Bernard talked it to me down there at the time this letter was written, that the Chinese would be carried back from Mexico in twenty days.

Q. (By Mr. STONE.) Let's see your right hand. (Witness exhibits hand.) [182]

Q. (By Mr. STONE.) Hold it up to the jury.

Mr. DOCKWEILER.—One minute. (Here witness exhibits hand to the jury.)

Mr. DOCKWEILER.—That is objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

And we assign the conduct of the district attorney in this matter as error.

The COURT.—Very well. If you want any instructions to the jury to disregard it—but that would be futile. I take it.

Mr. STONE.—Where the personal appearance of the witness is concerned, the fact that he comes on

(Testimony of Jung Kim.)

the stand, where I presume every man could see his condition—

The COURT.—Well, let it stand as it is. There is nothing I can do, anyway. If there is error in the record, I cannot help it now. I may say this, though, that I don't think there is error in the request of the U. S. Attorney for him to exhibit his thumb.

[Testimony of Sam Yick, for Defendants.]

SAM YICK, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. DOCKWEILER.

(The witness is sworn through an interpreter.)

Mr. STONE.—I understand that defendant speaks English well. I may have been wrongfully informed, but I insist he be examined in English if he can be.

The COURT.—Very well.

Mr. DOCKWEILER.—In talking with him there are times I understand him and times I do not.

The COURT.—Well, see if you *can along* without the interpreter.

Mr. DOCKWEILER.—Very well. [183]

(Witness testifying in response to questions by Mr. Dockweiler.) I knew Mr. Morse, the witness who has testified in this case, on October the 14th, 1911. I saw him at Bakersfield early in the morning of that day in my store. I was not up when he called. The store was not open. My wife opened the door for him. Mr. Morse came and he wanted a hundred dollars bad. I told him I had no money but I borrowed

(Testimony of Sam Yick.)

a hundred dollars from my [184] wife and gave it to him. He has not paid it back.

Cross-examination by Mr. STONE.

The money I gave Mr. Morse was five twenty dollar gold pieces; I looked at the clock once while Mr. Morse was in the store but I don't remember now, but it was nearer seven than six o'clock.

Q. On May 8, 1911, did you take a ride out in the country in a buggy with Mr. Morse?

Mr. DOCKWEILER.—We object to the question as not cross-examination, and we assign as error the conduct of the District Attorney in presenting that question, the object being to prejudice the jury against this defendant who is on the witness-stand.

Mr. STONE.—In answer to that I will state that I first asked your Honor if I could go into that matter and your Honor said that unless they objected you would not restrict the examination.

The COURT.—I said I could not pass upon it in advance of an objection.

Mr. STONE.—The question was not asked for the purpose of prejudicing this jury against the witness, but for the purpose of learning his connection with the matter and whether or not the Government witnesses have told the truth.

The COURT.—The objection is sustained.

Mr. DOCKWEILER.—And we assign as error the statement of counsel just made with reference to the defendant, because counsel certainly knows the rule.

(Witness continuing.) I did not get any receipt for this one hundred dollars at all. I asked for a

(Testimony of Sam Yick.)

receipt and Mr. Morse would not give it. I live in new China Town and my house is about half or three-quarters of a mile from the Southern Pacific depot. [185] Mr. Morse already had the money when I asked him for the receipt; he was in the house when I gave him the money; after he left my house he went up town towards the American town.

[Testimony of Mrs. Sam Yick, for the Defendants (Recalled).]

Mrs. SAM YICK, recalled at the request of the jury.

Q. (By JUROR.) I would like to ask her what kind of money she gave Mr. Morse. (To the interpreter.) Ask her what kind of coin was it she gave Mr. Morse.

(Witness testifying through interpreter.)

A. Gold coin.

Q. What kind? What denomination?

A. Big pieces, five of them.

Q. (By Another JUROR.) I would like to ask the witness if she can speak English.

The COURT.—Ask her. (Question asked through an interpreter.)

A. No.

The JUROR.—And born in San Francisco?

A. Yes.

Q. (By Mr. DOCKWEILER.) Do you understand English? A. No.

Mr. DOCKWEILER.—That is all.

Here the defendants rested their case.

WITNESSES IN REBUTTAL.

**[Testimony of Edward P. Morse, for the Government
(Recalled in Rebuttal).]**

EDWARD P. MORSE, a witness recalled on behalf of the Government in rebuttal, testified as follows:

Direct Examination by Mr. STONE.

From six to eight o'clock in the morning of October the 14th, 1911, I was inspecting passenger trains at the Southern Pacific depot and the Santa Fe depot at Bakersfield. I first inspected [186] the trains of the Southern Pacific depot. I went to the Southern Pacific depot very shortly before six o'clock in the morning. The first train that I was to meet there arrived at 6:05 and I usually got there from five to fifteen minutes before that. I usually stayed at the Southern Pacific depot until about twenty minutes of seven and then I took the trolley car, rode over to the Santa Fe depot to meet the train there that arrives at seven o'clock. The Santa Fe depot is about a mile and a quarter from the Southern Pacific depot. I made notes in my notebook and also made weekly reports of my employment and where I was at different hours. (Witness examining paper handed to him by Mr. Stone.) Yes, this is my weekly report from October the 8th, 1911, to October the 14th, 1911, inclusively. I made out this report and sent it to Mr. Connell in Los Angeles. I probably finished this report on the 15th and mailed it that day or the following day to Los Angeles. Refreshing my memory from my memo-

(Testimony of Edward P. Morse.)

random on the morning of October the 14th, 1911, there was one Chinaman that arrived on train No. 7. This train is due at 6:05 and was very close on time. I stayed at the Southern Pacific depot until about 6:40; there was a car that left there approximately at 6:40, which just gave me time to get to the Santa Fe at seven o'clock. On leaving the Southern Pacific depot I went to the Santa Fe depot and I arrived there approximately at seven o'clock. I stayed there until about eight o'clock. I inspected three Santa Fe trains between seven o'clock and close to eight o'clock A. M. Between my inspection of the trains I did not go to any place except the two depots that I have mentioned. The Santa Fe depot is fully half a mile from Sam Yick's place.

Cross-examination by Mr. DOCKWEILER.

(At the request of counsel witness draws lead pencil sketch showing the location of the Southern Pacific depot and the Santa [187] Fe depot, and the location of both of them with reference to Sam Yick's house as they existed in October, 1911.)

(Witness testifying.) The line I have drawn on this sketch running from the Southern Pacific depot to the Santa Fe depot indicates the trolley line that I travelled on in going from the Southern Pacific to the Santa Fe. Sam Yick's store was located in a general direction between the Santa Fe depot and the Southern Pacific depot and was one square south of the car line between the two depots; it was on Eighteenth Street. Sam Yick's store was about in the middle of the cross-street between Eighteenth

(Testimony of Edward P. Morse.)

and Nineteenth; it was in about the middle of the block. The distance from Eighteen to Nineteenth Street was approximately six hundred feet. The block in the middle of which Sam Yick's store was located was about the same length. My memorandum-book (here witness examines memorandum-book handed him by counsel) does not show under date of October the 14th, 1911, what time I arrived or what time I left the Southern Pacific depot; it does not show the time of my arrival or departure from the Santa Fe depot. I got up about a quarter past five on October the 14th, 1911; it took me probably ten or fifteen minutes to dress. I left the house without breakfast and went to the Southern Pacific depot. I got there a few minutes before six. I remained there until a quarter to seven and from there I went straight to the Santa Fe depot on the street-car line. I got to the Santa Fe depot about seven o'clock; stayed there about an hour and left there about eight. On my way from the Southern Pacific depot to the Santa Fe depot it was possible for me to have got off the trolley car at either P Street or Q Street, walk one block south, then for a block east or west, and return and take the trolley car and gone straight to the Santa Fe depot; that could have been done at any time. There was no physical obstacle to prevent my doing so on the morning of October 14th, 1911. It would have taken me probably ten minutes to have got off [188] the street-car on my way to the Santa Fe depot, gone to Sam Yick's store, stayed there five minutes or so and got back to the car line

(Testimony of Edward P. Morse.)

again. If I had done that though I would have to wait twenty minutes for another car. I had no conveyance that morning at all. The distance from Sam Yick's store to the Santa Fe depot is between half and three-quarters of a mile. I could have walked it briskly in twenty minutes or so. From the Southern Pacific depot to Sam Yick's store without the street-car it would have taken me thirty-five or forty minutes to go there. On October the 14th, 1911, the street-car running from the Southern Pacific depot to the Santa Fe was scheduled to run every twenty minutes, at least that is the best of my recollection. I have no idea how often they run now. The schedule was changed between October, 1911, and April, 1912, and at the latter time they were running oftener. I inspected three trains coming in on the Southern Pacific on the morning of October the 14th. No. 7 arrived at six o'clock, and No. 83 arrived, which was scheduled to depart at seven A. M., and Nos. 25 and 49 which arrived shortly after midnight until about 2:30 A. M. I left the Southern Pacific depot that morning about 6:40 and got to the Santa Fe depot about seven. I did not loiter on the way or get off the street-car or stop at any place. I did not walk from one depot to the other, and I did not ride on the street-car to a certain point and then get off and walk the balance of the distance. After leaving the Santa Fe depot about eight o'clock I went to the Sheriff's office, got my mail and stayed there for an hour or more.

**[Testimony of Forrest V. Owen, for the Government
(in Rebuttal).]**

FORREST V. OWEN, a witness called on behalf of the Government in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. STONE.

My name is Forrest V. Owen. I live at Bakersfield. Have lived [189] there for seven years. I am in the railroad business there. I am chief clerk to the superintendent of that division of the Southern Pacific Railroad. In October, 1911, I was chief clerk in one of the departments of the Southern Pacific Railroad at Bakersfield. At that time the Southern Pacific Railroad kept the regular dispatcher's train sheets which would show the arrival and departure of trains. I have such sheet for the 14th day of October, 1911. This record shows that Southern Pacific train No. 7 arrived at the passenger station at Bakersfield at 6:22 A. M., October the 14th, 1911. My recollection is that this train was scheduled to arrive at 6:05 A. M. Train No. 83, on October the 14th, 1911, left Bakersfield passenger station at 7:12 A. M.; the regular time was seven o'clock.

Cross-examination by Mr. DOCKWEILER.

The train scheduled to arrive at 6:05 actually arrived at 6:22 A. M., and there was a train made up at Bakersfield which actually left there at 7:12 A. M. on the morning of October the 14th, 1911.

Mr. DOCKWEILER.—We will introduce this sketch made by Mr. Morse as Defendants' Exhibit

(Testimony of Forrest V. Owen.)

“B.” (Here sketch made by witness Morse was introduced in evidence filed and marked Defendants’ Exhibit “B.”)

Here the Government and the defendants rested.

**[Instructions Requested by Defendants and
Refused.]**

Thereupon the defendants requested the Court to give to the jury the instructions hereinafter immediately set out, which request was by the Court refused as to each and every one of the said instructions, to each and every one of which refusals the defendants and each of them duly excepted. [190]

You, Gentlemen of the Jury, are the sole judges of the facts in this case, and of the creditability of the witnesses. Before reaching a verdict, you will carefully consider and compare all the testimony. You will observe the demeanor of the witnesses on the witness-stand, their interest in the result of your verdict, if any such interest is shown, the probability of the truth of their testimony, their bias or prejudice, or the absence of either of these qualities, and the facts and circumstances given in evidence or surrounding the witnesses at the trial. A witness false in one part of his testimony is to be distrusted in others, and if you find from the consideration of all of the testimony in this case that any witness has wilfully testified falsely to any material fact, you are at *the* liberty to disregard the testimony of that witness entirely, except in so far as he may be corroborated by other creditable testimony or by other known facts in the case.

(Section 2061, Subdivision 3, Code of Civil Procedure of California. *People vs. Dolan*, 96 Cal. 315; *People vs. Arlington*, 131 Cal. 231; *U. S. vs. G. Wing*, 426 Crim., Decided by Judge Rudkin.) [191]

The Jury is further instructed that the fact that the two defendants in this case are Chinamen, of course, is immaterial. They are subject to the law, and they are under its protection. They are entitled to the same fair and impartial consideration by you as a citizen or subject of any other country, or as any citizen of the United States. [192]

The Jury is instructed that a defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, and his neglect or refusal to be a witness can in no way prejudice him, or be used against him on the trial of the proceeding.

And I further instruct you that every person accused of a public offense is presumed in law to be innocent of the crime charged until his guilt is established to the satisfaction of the Jury and beyond a reasonable doubt. This presumption in this case is not any fiction, to be disregarded by you at pleasure; it is a substantial part of the law of the land; it accompanies these defendants throughout the trial and abides with them until its last vestige is destroyed, and until you are satisfied of their guilt beyond a reasonable doubt, notwithstanding the presumption of *offense* with which the law surrounds them.

(California Penal Code, Section 1323.) [193]

The only crimes punishable under Federal law are those defined by the laws enacted by Congress.

Therefore, it must be kept in mind that the prosecution in this case is for an alleged statutory crime. The elements of the crime of conspiracy under the laws of the United States are: (1) an object to be accomplished which must be (a) the commission of an offense against the United States; (b) to defraud the United States. (2) A plan or scheme embodying means to accomplish the object. (3) An agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means. (4) An overt act by one or more of the conspirators to effect the object of the conspiracy.

(U. S. v. Munday, 189 Fed. 375, p. 377.) [194]

A reasonable doubt is a doubt as will cause a reasonable prudent and *considerable* man to hesitate or waver in the greatest or most important affairs of human life, before acting upon the truth of the matters charged or alleged. This doubt may arise from the evidence, or from the lack of evidence. If from a full and fair consideration of all the testimony, you have not an abiding conviction to a moral certainty of the guilt of the defendants, and if you have such a doubt as causes you to hesitate or waver as to the guilt of the defendants, or if you have a doubt for which a reason cannot be assigned, then it is your duty to return a verdict of not guilty. [195]

The Jury is instructed that while a conspiracy may be proven by circumstantial as well as by direct evidence, it must nevertheless be proven by competent testimony and to your satisfaction beyond a rea-

sonable doubt before you will be warranted in finding a verdict of guilty; and where circumstantial evidence is relied upon, the circumstances themselves must be proven beyond a reasonable doubt, and when so proven, they must not only be consistent with the guilt of the accused, but they must not be consistent with any other rational hypothesis. It is your duty to reconcile the testimony consistently with the innocence of these defendants, if you can do so on any reasonable basis. [196]

The Jury is instructed that the law in a criminal case clothes the defendants, and each of them, with the presumption of innocence; and when proof tends to overthrow this presumption, and to fix upon such defendant the presumption of guilt, the latter is permitted to support the original presumption of innocence by proof of good character. Such good character, when proven, is a circumstance tending, in a greater or lesser degree, to establish his innocence. It is of value not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused. When proven, it is a fact in the case, and it is not to be put aside by the Jury in order to ascertain that the other facts and circumstances considered in themselves do not establish the defendants' guilt beyond a reasonable doubt, but such good character, if proven, should be considered by the Jury in connection with all the other testimony in the case, and not independently thereof, and the guilt or innocence of the defendant determined from all the testimony of the case, and such good character, if proven, should be weighed as any other fact

established, and may, if proven, in itself be sufficient to raise a reasonable doubt as to the defendants' guilt in the minds of the Jury. If the Jury find the evidence conflicting, and doubtful as to defendants' guilt, the importance which the Jury are authorized to give to the evidence of good character is thereby increased.

(State vs. Brown, 39 Utah, 190, 115 Pac. 994; People vs. Doggett, 62 Cal. 29; U. S. vs. Newton, 52 Fed. Rep. 275, at page 290.) [197]

The Jury is instructed that if you find from the evidence that Inspector A. P. Morse and Inspector A. G. Bernard were accomplices or co-conspirators with the defendants in this case, their testimony ought to be viewed with distrust, and their evidence as to the oral admissions of the defendants in this case ought to be viewed with caution, and you are further instructed even if you find from the evidence that Inspector A. P. Morse and Inspector A. G. Bernard were accomplices or co-conspirators with said defendants, a conviction cannot be had on their testimony alone, unless they are corroborated by other evidence, which in itself and without the aid of their evidence tends to connect the defendants with the commission of the offense charged in the indictment; and the corroboration is not sufficient for a conviction if it merely shows the commission of the offense or the circumstances thereof.

(Section 1111 of the California Penal Code; also Section 2061, Subdivision 4, of the California Code of Civil Procedure.) [198]

No conspiracy can exist without at least two persons being conspirators therein. One person cannot constitute a conspiracy. Therefore, if you find from the evidence that the acts charged by the Government in the indictment to have been committed by the defendant Jung Kim were performed by said defendant, Jung Kim, simply as an employee, servant, or agent of the defendant, Sam Yick, and were performed by said defendant, Jung Kim, without any common design, purpose or understanding on the part of said defendant, Jung Kim, and said defendant Sam Yick, then I instruct you that said defendant, Jung Kim, cannot be considered a conspirator with said defendant, Sam Yick, and if you further find that the acts performed by Inspector A. P. Morse, and Inspector A. G. Bernard were performed solely for the purpose of entrapping the defendants, and without any common design, purpose or understanding with said defendant, Sam Yick, or said defendant, Jung Kim, and without any unlawful intent on the part of said Inspector A. P. Morse and said Inspector A. G. Bernard, then I instruct you that said Inspector A. P. Morse and said Inspector A. G. Bernard cannot be considered as co-conspirators with said defendant, Sam Yick, and that it necessarily follows that the proof of the commission of the conspiracy alleged in the indictment is reduced to one person, to wit, Sam Yick, and that one person alone cannot form or constitute a conspiracy, even though you find that all of the acts charged in the indictment were done by the defendant, and you must return a

verdict of acquittal as to both of the defendants.

(U. S. vs. Newton, 52 Federal, 275, at page 280 and page 286.) [199]

The jury is instructed that an accomplice is a person knowingly, voluntarily, and with common intent with the principal offender, voluntarily unites and actually co-operates with him in the commission of a crime. Where the evidence is conflicting as to whether the co-operation is voluntary and real, it is for the Jury to determine whether such witness is an accomplice. If you find from the evidence that the witnesses, Inspector Morse and Inspector Bernard, or either of them, were accomplices with the defendants, or either of them, then I instruct you that the testimony of such of them as you may find to be an accomplice ought to be viewed with distrust and caution, and should not be believed by you, unless corroborated by independent testimony tending to connect the defendants with the offense charged in the indictment. A conviction cannot be had upon the testimony of an accomplice alone. He must be corroborated by such other independent evidence as shall tend to connect the accused with the commission of the offense. This corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, nor can the statement of one accomplice be regarded as sufficient corroboration of the statement of another accomplice. The corroboration which merely raises a suspicion of guilt because the accused had an opportunity to commit the offense is not sufficient. It is for the Jury to

determine whether the testimony of such witness or witnesses you may find to be accomplices in this case has been so corroborated as to establish the guilt of the accused beyond a reasonable doubt, and if you find that the testimony of such witness or witnesses as you may find to be accomplices has not been so corroborated, as to either of the defendants, then as to such defendant your verdict should be not guilty.

(California Penal Code, Section 1111; California Code of Civil Procedure, Section 2061, Sub. 4; Wharton's Criminal Evidence, Vol. 1, Sections 440, 441; 10 Edition.) [200]

The Jury is instructed that the defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, but if he offer himself as a witness, he may be cross-examined by the prosecuting attorney as to all matters about which he was examined upon direct examination. And defendant's failure or neglect to be a witness or to testify upon any particular point or any matter connected with the case, should not in any manner prejudice him nor be used against him on the trial or proceeding, or considered by you in determining his guilt or innocence.

(Section 1323, Cal. Penal Code; *People vs. McGunghill*, 41 Cal. 429, at page 431; *People vs. Sanders*, 114 Cal. 216, at page 238; *Balliet vs. U. S.*, 129 Federal, C. C. A., 689, at page 695; *Dimmick vs. U. S.*, C. C. A. Ninth Circuit, 121 U. S. 638, at page 644; *State vs. Elmer*, 115 Mo. 401, 22 S. W. 369; *Lewis vs. State*, 137 Indiana, 344, 36 N. E. 1110; *State vs. Graves*, 95 Mo. 510, 8 S. W. 739.) [201]

The Jury is instructed that the mere fact that the defendants herein have been indicted by a United States Grand Jury, does not, of itself, raise any presumption in any manner whatsoever that either of the defendants are guilty, as charged in the indictment, and the fact that the defendants have been indicted by a grand jury must be considered by you in passing upon the question of the guilt or innocence of the defendants.

[Endorsed]: 575—Crim. U. S. Dist. Court, Southern Dist. of Calif., Southern Division. United States vs. Sam Yick et al. Instructions requested by defendant Refused. Filed Apr. 2, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Dept. Clerk.
[202]

[Instructions of Court to Jury.]

The Court thereupon gave and read to the jury the instructions hereinafter immediately set forth to the giving of each and every one of which instructions the defendants and each of them duly excepted.
[203]

Gentlemen of the Jury:

The indictment in this case was found under section 37 of the United States Criminal Code, which is in substance as follows:

“If two or more persons conspire * * * to commit any offense against the United States * * * and one or more such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be” punished as prescribed in said Section.

The offense which it is alleged the defendants con-

spired to commit was a violation of the act of July 5th, 1882, as amended by the act of July 5th, 1884, in substance as follows:

“That any person who shall knowingly bring into, or cause to be brought into the United States by land, or who shall aid or abet the same, * * * any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished as provided in said Section.” [204]

The charge against the defendants, comprehensively stated is, that they conspired to smuggle into the United States Chinese laborers not entitled to enter, and, that one of the defendants, Jung Kim, committed certain overt acts, namely, that he, said Jung Kim, at the City of Bakersfield, County of Kern, State of California, on September 8th, 1911, purchased a certain railway ticket for his transportation from said City of Bakersfield to the City of San Diego, County of San Diego, in said State, and on said date left and departed from said City of Bakersfield, over the line of the Southern Pacific Railway, and traveled from said City of Bakersfield to said City of San Diego, and that said Jung Kim, on September 13th, 1911, went from said City of San Diego to the town of Tia Juana, Mexico, for the purpose of arranging to bring into the United States, as alleged in the indictment, the three Chinese persons therein named, to wit, Dock Yook, See Chew and Wah Sung, said persons being, as defendants well knew, Chinese laborers, not entitled to enter, be or remain in the United States.

Since the character and objects of the conspiracy, as well as the overt acts, are fully set forth in the indictment, which has been read to you, and will be with you in the Jury room, its contents need not be further recited here.

By the words, "overt acts" is meant, the things which it is alleged the defendant Jung Kim did in furtherance of, and to effect the objects of the conspiracy.

Thus, the Jury will observe, that the defendants are not on trial for unlawfully bringing Chinese laborers into the United States, but for having conspired to do so. [205]

You will be called upon, in this case, to consider, among others, the following questions: "Was there a conspiracy, between the defendants, and did the defendant Jung Kim commit the overt acts, or either of them, as alleged in the indictment?"

If the evidence satisfies you beyond a reasonable doubt, that said conspiracy existed, and, that said Jung Kim committed said overt acts, or either of them, you will find the defendants guilty as charged in the indictment.

If, however, the evidence fails to so satisfy you of the existence of said conspiracy, or of the commission by said Jung Kim of either of said overt acts, you will find the defendants not guilty. [206]

The Court further charges you, that a conspiracy is a combination between two or more persons to do a criminal or unlawful act, or a lawful act by criminal or unlawful means.

From this definition of conspiracy, it follows, of

course, that there can be no conspiracy where one individual acts by and for himself only.

A mere mental purpose cannot justify a conviction of conspiracy. A common design is of the essence of the charge.

A person, therefore, in order to become a party to a conspiracy, must combine with some one else to effect the object of the conspiracy by the means agreed upon. [207]

The Court further instructs you, that, to constitute a conspiracy, it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or, that they should directly, by words, or in writing, state what the unlawful scheme was to be and the details of the plan or means by which an unlawful combination was to be made effective. It is sufficient if two or more persons have, in any manner or through any contrivance, knowingly co-operated, acted or worked together to accomplish a common and unlawful design.

Conspiracy can seldom be proved by direct testimony. Persons combining for the execution of an unlawful enterprise do not ordinarily expose themselves to public observation and the fact of a combination can, therefore, as a general rule, be established only by proof of the acts of the several parties in such combination, the relation of these acts to each other, and their tendency by united effect to produce the common results.

The evidence in proof of a conspiracy will, generally, from the nature of the case, be circumstantial.

Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design, and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part, and another another part of the same so as to complete it, with a view of attaining the same object, the Jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. [208]

The Court further charges you, that, where circumstantial evidence is relied upon to establish the conspiracy, or any other fact, it is not only necessary, that all the circumstances concur to show the existence of the conspiracy or other fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. [209]

The Court further instructs you, that the fact, if it be a fact, that Government officers incited or aided defendants to commit the crime charged against them, if they did commit it, is no bar to a prosecution by the Government.

The Court further instructs you, that persons engaged in a criminal conspiracy, such as here charged, may be held guilty of the crime, even though they were incited to it by Government officers, or were acting in the belief that Government officers or agents were co-operating with them, and notwithstanding the parties so engaged were depending upon such officers to protect them from arrest, and to aid in carrying out the objects of the conspiracy.

If, therefore, you find from the evidence, beyond a reasonable doubt, that there was a conspiracy between the defendants, as alleged in the indictment, and that the defendant Jung Kim committed either of the overt acts therein charged, it will be your duty to find the defendants guilty, notwithstanding officers of the Government participated, if they did participate, in any of the acts committed by defendants, or either of them. [210]

Reference has been made in argument by counsel on both sides to the fact, that the defendants in this case are Chinamen. The Court instructs you, that this fact should not create in your minds any bias or prejudice either for or against them. They are subject to the law and under its protection, and of course entitled to the same fair and impartial consideration by you as a citizen or subject of any other country or a citizen of the United States. [211]

A number of witnesses have testified to the good character of defendant, Sam Yick. On this subject, the Court charges you, that the good character of a person accused of a crime, when proven, is itself a fact in the case; it must be considered in connection with all the other facts and circumstances admitted in evidence on the trial, and if, after such consideration, the Jury are not satisfied, beyond a reasonable doubt, of the guilt of defendant Sam Yick, they should acquit him. If, however, they are so satisfied from all the evidence in the case, that said defendant is guilty, they should convict him, notwithstanding proof of good character. [212]

The Court further instructs you that you are the

sole judges of the facts and the credibility of the witnesses, and, in passing upon the credibility of witnesses, you may consider, among other things, their intelligence, their relation to the controversy and to the parties; the interest, if any, they have in the result of the trial; their prejudices and motives; their hopes and fears; their bias or impartiality; the reasonableness, or otherwise, of the statements they make—together with their manner upon the witness-stand, and should give to their testimony such weight as you believe it entitled to receive.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter here involved, the Jury should distrust his testimony in other particulars, and are at liberty to reject the whole, or any part of it.

The defendants are competent witnesses in their own behalf, and you must weigh their testimony according to the same rules that you weigh the testimony of any other witness. Of course, as in the case of any other witness, you may consider their interests in your verdict.

A defendant in a criminal case cannot be compelled to be a witness against himself, but if he offer himself as a witness, he may be cross-examined by the prosecuting attorney as to all matters about which he was examined upon direct examination. A defendant's failure or neglect to be a witness or to testify upon any particular point, or any matter connected with the case, should not in any manner prejudice him nor be used against him on the trial, or be

considered by you in determining his guilt or innocence. [213]

The Court further instructs you, that while you are the sole judges of the facts and the credibility of witnesses, it is the province of the Court to submit to you the law of the case, and, that it is your duty to accept and apply the law as given to you by the Court, whatever your individual ideas may be upon the subjects involved. [214]

The Court further instructs you that the finding of an indictment raises no presumption whatever of a defendant's guilt, but the burden of proof is on the Government, and that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt, and, that this rule applies to every material element of the offense charged. The Court further instructs you that a reasonable doubt is one which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt. [215]

[Order Settling and Allowing Bill of Exceptions.]

It is hereby stipulated that the foregoing may constitute a bill of exceptions of the above-entitled cause

and that the same may be settled by the judge who tried the same.

Dated this 8th day of October, 1914.

ALBERT SCHOONOVER,

United States Attorney.

DUKE STONE,

Assistant United States Attorney.

ROBT. O'CONNOR,

Assistant United States Attorney, Attorneys for
Plaintiff.

MOTT and DILLON and

ISIDORE B. DOCKWEILER,

Attorneys for Defendants and Appellants.

[Stipulation Re Bill of Exceptions, etc.]

The foregoing Bill of Exceptions, containing all of the evidence offered and introduced at the trial of said cause, necessary to a review of said cause on this appeal, and the instructions of the Court to the jury, with the defendants' exceptions thereto, and containing all of the proceedings at the trial of said cause, to and including the verdict of the jury, is a true and correct Bill of Exceptions, and is hereby settled and allowed, and ordered to be filed.

Dated this 8th day of October, 1914.

OLIN WELLBORN,

Judge.

[Endorsed] Crim. #575. In the United States District Court Within and for the Southern District of California, Southern Division. United States of America Plaintiff, vs. Sam Yick [216] and Jung Kim, *alias* Jang Chung, Defendants. No. 575 Crimi-

nal. Bill of Exceptions on Behalf of Defendants Sam Yick and Jung Kim. Filed Oct, 8, 1914, at 35 min. past 10 o'clock A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. Mott & Dillon, 1126 Merchants National Bank Bldg., Los Angeles, California. [217]

United States District Court in and for the Southern District of California, Southern Division.

#575—Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM YICK, JUNG KIM, *alias* JANG CHUNG,

Defendants.

Petition for Writ of Error.

Your petitioners Sam Yick and Jung Kim, *alias* Jang Chung, defendants in the above-entitled cause, bring this petition for a writ of error to the District Court of the United States, in and for the Southern District of California, Southern Division, and in that behalf your petitioners say:

That on the 4th day of May, 1914, there was made, given, rendered and entered in the above-entitled court and cause judgment against your petitioner wherein and whereby your petitioner, Sam Yick, was sentenced to be imprisoned for twelve months in the County Jail of the County of Kern, and your petitioner Jung Kim, *alias* Jang Chung, was sentenced to imprisonment for six months in the County jail of the County of Kern; and your petitioners say

that they are and each of them is advised by counsel, and they and each of them avers that there was and is manifest error in the records and proceedings had in such cause and in the making, giving, rendition and entry of such judgment and sentence, to the great injury and damage of your petitioners, all of which errors will be more fully made to appear by an examination of the said record, and by an examination of the bill of exceptions by your petitioners to be tendered and filed, and in the assignment of errors hereinafter [218] set out, and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals, Ninth Circuit, your petitioners now pray that a writ of error may be issued directed therefrom to the said District Court of the United States for the Southern District of California, Southern Division, returnable according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioners.

And your petitioners now make the assignment of errors filed herewith upon which they will rely and which will be made to appear by return of said record in obedience to said writ.

WHEREFORE your petitioners pray the issuance of the writ as herein prayed, and pray that the as-

signment of errors filed herewith may be considered as their assignment of errors upon the writ, and that the judgment rendered in this cause may be reversed and held for naught and that said cause be remanded for further proceedings and that they be awarded a supersedeas upon said judgment, and all necessary processes, including bail.

MOTT AND DILLON and

ISIDORE B. DOCKWEILER,

Attorneys for Defendants Sam Yick and Jung Kim,
alias Jang Chung.

SAM YICK.

JUNG Kim. [219]

[Endorsed]: No. 575—Crim. United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Sam Yick, Jung Kim, *alias* Jang Chung, Defendants. Petition for Writ of Error. Filed May 6, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Mott & Dillon, 426 Douglas Bldg., Los Angeles, Cal., Attorneys for Defendants. [220]

*In the United States District Court in and for the
Southern District of California, Southern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM YICK, JUNG KIM, *alias* JANG CHUNG,
Defendants.

Assignment of Errors.

Sam Yick and Jung Kim, *alias* Jang Chung, defendants in the above-entitled cause, and plaintiffs in error herein having petitioned for an order from said Court permitting them to procure a writ of error from this Court directed to the United States Circuit Court of Appeals, Ninth Circuit, from the judgment and sentence made and entered in said cause against said plaintiffs in error, and petitioners herein, now make and file with their said petition the following assignment of errors herein, which they aver occurred on the trial of said cause, and upon which they will rely for a reversal of said judgment and sentence upon the said writ, and which said errors and each and every one of them are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon them by law; and they say that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the Southern District of California, Southern Division, there is manifest error in this, to wit:

1. The Court erred in refusing to compel the United States District Attorney and the Immigration officials and each [221] of them to surrender and to deliver up to the defendant Sam Yick upon his demand therefor those certain letters and papers secured and obtained from the trustee in bankruptcy in the matter of the Sam Yick Company Bankruptcy, and which letters and papers were subsequent to such

demand and against the defendants' objections introduced in evidence by plaintiffs and are marked respectively as United States Exhibits 12-A, 12-B, 12-C, 12-D, 12-E, 12-F, 12-G, 12-H, 12-I, 12-J, 12-K, 12-L, 12-M, and 8, and to which action of the Court the defendants and each of them duly excepted.

2. That the Court erred in admitting in evidence against defendants' objections plaintiffs' exhibits marked respectively United States Exhibits 12-A, 12-B, 12-C, 12-D, 12-E, 12-F, 12-G, 12-H, 12-I, 12-J, 12-K, 12-L, 12-M, and 8, and each of them, and to which action of the Court the defendants duly excepted.

3. The Court erred in charging the jury as follows:

The Court further instructs you that the fact if it be a fact that Government officers incited or aided defendants to commit the crime charged against them, if they did commit it, is no bar to a prosecution by the Government. The Court further instructs you that persons engaged in a criminal conspiracy such as here charged may be held guilty of the crime even though they were incited to it by Government officers or were acting in the belief that Government officers or agents were co-operating with them, and notwithstanding the parties so engaged were depending upon such officers to protect them from arrest and to aid in carrying out the objects of a conspiracy.

If, therefore, you find from the evidence beyond a reasonable doubt that there was a conspiracy be-

tween the defendants as alleged in the indictment, and that the defendant Jung Kim committed either of the overt acts therein charged [222] it will be your duty to find the defendants guilty, and notwithstanding officers of the Government participating, if they did participate in any of the acts committed by the defendants or either of them.

To which charge as given by the Court the defendants duly excepted.

4. The Court erred in refusing to instruct the jury, as requested by defendants, as follows, to wit:

The jury is instructed that if you find from the evidence that Inspector A. P. Morse and Inspector A. G. Bernard were accomplices or co-conspirators with the defendants in this case, their testimony ought to be viewed with distrust, and their evidence as to the oral admissions of the defendants in this case ought to be viewed with caution, and you are further instructed that if you find from the evidence that Inspector A. P. Morse and Inspector A. G. Bernard were accomplices or co-conspirators with said defendants, a conviction cannot be had on their testimony alone, unless they are corroborated by other evidence, which in itself and without the aid of their evidence tends to connect the defendants with the commission of the offenses charged in the instrument; and the corroboration is not sufficient for a conviction if it merely shows the commission of the offense or the circumstances thereof. To which refusal of the Court said defendants and each of them, duly excepted. [223]

5. The Court erred in refusing to instruct the

Jury as requested by the defendants as follows, to wit:

The jury is instructed that an accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, voluntarily unites and actually co-operates with him in the commission of a crime. Where the evidence is conflicting as to whether the co-operation is voluntary and real, it is for the jury to determine whether such witness is an accomplice. If you find from the evidence that the witnesses, Inspector Morse and Inspector Bernard, or either of them, were accomplices with the defendants, or either of them, then I instruct you that the testimony of such of them as you may find to be an accomplice ought to be viewed with distrust and caution, and should not be believed by you, unless corroborated by independent testimony tending to connect the defendants with the offense charged in the indictment. A conviction cannot be had upon the testimony of an accomplice alone. He must be corroborated by such other independent evidence as shall tend to connect the accused with the commission of the offense. This corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, nor can the statement of one accomplice be regarded as sufficient corroboration of the statement of another accomplice. The corroboration which merely raises a suspicion of guilt because the accused had an opportunity to commit the offense is not sufficient. It is for the jury to determine whether the testimony of such witness or witnesses

as you may find to be accomplices in this case has been so corroborated as to establish the guilt of the accused beyond a reasonable doubt, and if you find that the testimony of such witness or witnesses as you may find to be accomplices has not been so corroborated, as to either of the defendants, then as to such defendant your [224] verdict should be not guilty, to which refusal of the Court said defendants and each of them duly excepted.

6. That the Court erred in overruling and denying defendants motion for a new trial.

7. That the Court erred in making, giving and rendering judgment against the defendants on the indictment herein for the reason that the verdict of the jury was against the law in that the evidence showed that the crime alleged to have been committed by the defendants was instigated, procured and induced by officers and employees of the United States Government, and was not planned or committed by said defendants other than through said instigation, plan and procurement of said officers and the government.

8. The Court erred in pronouncing sentence against the defendants.

MOTT and DILLON and

ISIDORE B. DOCKWEILER,

Attorneys for Sam Yick and Jung Kim, *alias* Jang Chung, Plaintiffs in Error.

United States of America,
Southern District of California,
Southern Division,—ss.

We hereby certify that the foregoing assignment

of errors are made on behalf of the petitioners for a writ of error herein, and are in our opinion well taken, and the same now constitute the assignment of errors upon the writ prayed for.

MOTT & DILLON and,

ISIDORE B. DOCKWEILER,

Attorneys for Plaintiffs in Error. [225]

[Endorsed]: No. 575—Crim. United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Sam Yick, Jung Kim, *alias* Jang Chung, Defendants. Assignment of Errors. Filed May 6, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Mott & Dillon, 426 Douglas Bldg., Los Angeles, California, Attorneys for Defendants. [226]

In the United States District Court, in and for the Southern District of California, Southern Division.

No. 575—Criminal.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM YICK, JUNG KIM, *alias* JUNG CHUNG,

Defendants.

Order Allowing Writ of Error and Admitting Defendants to Bail.

On this 7th day of May, 1914, came the defendants Sam Yick and Jung Kim, *alias* Jung Chung, by their attorneys, John G. Mott and Isidore B.

Dockweiler, and presented to the Court their petition heretofore filed herein, praying for the allowance of a Writ of Error, and Assignment of Errors, intended to be urged by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises;

On consideration whereof, IT IS ORDERED that said petition be, and the same is hereby allowed and granted, and that a Writ of Error be, and the same is hereby allowed in said cause, and returnable before the said United States Circuit Court of Appeals for the Ninth Judicial Circuit, on the 5th day of June, A. D. 1914, and that a transcript of the record and of all the proceedings and papers on which the judgment was made and entered in this cause shall be made and transmitted to the United States Circuit Court of Appeals for the Ninth [227] Judicial Circuit, and said writ shall operate as a supersedeas and stay of execution.

And it appearing that the United States attorney has no objection, IT IS FURTHER ORDERED that the defendant, Sam Yick, be admitted to bail pending said Writ of Error, in the sum of Six Thousand (\$6,000.00) Dollars, conditioned as the law directs, and that the defendant, Jung Kim, be admitted to bail pending said Writ of Error, in the sum of Five Thousand (\$5,000.00) Dollars, conditioned as the law directs; and

IT IS HEREBY FURTHER ORDERED that each of the undertakings, now tendered by each of said defendants, be, and the same are, and each of them is, hereby approved as the undertakings on Writ of Error herein, and also as such bail bonds.

Done this 8th day of May, 1914.

OLIN WELLBORN,
District Judge.

[Endorsed]: No. 575—Criminal. Dept. In the United States District Court for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Sam Yick, Jung Kim, *alias* Jung Chung, Defendants. Order Allowing Writ of Error and Admitting Defendants to Bail. Filed May 8, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Isidore B. Dockweiler. Suite 536 Douglas Bldg. Office Tel. Main 8756, Home 1320, Los Angeles, Cal., Attorney for Defendants. [228]

*In the United States District Court in and for the
Southern District of California, Southern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM YICK, JUNG KIM, *alias* JANG CHUNG,
Defendants.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, Sam Yick of Bakersfield, Kern County,

California, as principal, and C. H. Quincy, of Los Angeles, California, and W. E. Deacon, of Los Angeles, California, and Ella F. Filben, of Los Angeles, California, as sureties, are held and firmly bound to the United States of America in the full sum of \$6,000.00, lawful money of the United States, to be paid to the United States, and the further sum of \$300.00, lawful money of the United States, to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 6th day of May, 1914.

WHEREAS, lately at the term of the District Court of the United States for the Southern District of California, Southern Division, in the suit pending in the said Court between the United States of America, plaintiff, and Sam Yick, defendant, judgment and sentence was given, made and rendered [229] and entered against the said Sam Yick, defendant, and the said Sam Yick is about to apply for a writ of error from United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to terms and at or within the time to be fixed in said citation which said citation shall be duly issued and served within the time provided by law; now, the condition of the above application is such that if upon

the issuance of such writ and the service of such citation, as aforesaid, the said Sam Yick shall appear in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in the said Court and prosecute his writ of error, and if the said Sam Yick shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of such judgment and sentence as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said Court provided judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then this obligation to be void; otherwise to remain in full force, virtue and effect.

SAM YICK,

Principal.

C. H. QUINCY,

W. E. DEACON,

ELLA F. FILBEN,

Sureties. [230]

Southern District of California,—ss.

C. H. Quincy and W. E. Deacon, being duly sworn, each for himself deposes and says: That he is a householder in said District and is worth the sum of

\$6,300.00, exclusive of property exempt from execution and over and above all debts and liabilities.

[Seal]

C. H. QUINCY.

W. E. DEACON.

Subscribed and sworn to before me this 6th day of May, 1914.

CHAS. N. WILLIAMS,
United States Commissioner.

Southern District of California,—ss.

Ella F. Filben, being duly sworn, deposes and says: That she is a householder in said District and is worth the sum of \$6,300.00, exclusive of property exempt from execution and over and above all debts and liabilities.

[Seal]

ELLA F. FILBEN.

Subscribed and sworn to before me this 6th day of May, 1914.

CHAS. N. WILLIAMS,
United States Commissioner.

The foregoing bond and sufficiency of the sureties thereto is hereby approved.

Dated May 8th, 1914.

OLIN WELLBORN.

[Endorsed]: No. 575—Crim. United States District Court in and for the Southern District of California, Southern Division. [231] United States of America, Plaintiff, vs. Sam Yick, Jung Kim, *alias* Jang Chung, Defendants. Supersedeas Bond. Filed May 8, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Mott & Dillon, 426 Douglas Bldg., Los Angeles, California, Attorneys for Defendants. [232]

*In the United States District Court in and for the
Southern District of California, Southern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAM YICK, JUNG KIM, *alias* JANG CHUNG,

Defendants.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, Jung Kim, *alias* Jang Chung, of Bakersfield, Kern County, California, as principal, and C. H. Quincy, of Los Angeles, California, and W. E. Deacon, of Los Angeles, California, and Ella F. Filben, of Los Angeles, California, as sureties, are held and firmly bound to the United States of America in the full sum of \$5,000.00, lawful money of the United States, to be paid to the United States, and the further sum of \$300.00, lawful money of the United States, to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of May, 1914.

WHEREAS, lately at the term of the District Court of the United States for the Southern District of California, Southern Division, in the suit pending in the said Court between the United States of Amer-

ica, plaintiff, and Jung Kim, [233] defendant, judgment and sentence was given, made and rendered and entered against the said Jung Kim, *alias* Jang Chung, defendant, and the said Jung Kim is about to apply for a writ of error from United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and sentence and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, pursuant to terms and at or within the time to be fixed in said citation, which said citation shall be duly issued and served within the time provided by law; now, the condition of the above application is such that if upon the issuance of such writ and the service of such citation, as aforesaid, the said Jung Kim shall appear in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in the said Court and prosecute his writ of error, and if the said Jung Kim shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrender himself in execution of such judgment and sentence as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the District Court of United States for the Southern District of California, Southern Division, on such day or days as may be appointed for the retrial by said District Court, and abide by and obey all orders made by said

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAM YICK et al.,

Defendants.

On motion of Geoffrey C. O'Connell, Esq., of counsel for defendants, it is ordered that defendants be, and they hereby are granted thirty (30) days' additional time, after May 1st, 1914, within which to prepare, serve and file their proposed bill of exceptions herein. [236]

[Order Extending Time Thirty Days After June 1, 1914, to Prepare, etc., Bill of Exceptions.]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the twenty-ninth day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAM YICK et al.,

Defendants.

On motion of Geoffrey C. O'Connell, Esq., of counsel for defendants, it is ordered that defendants be, and hereby are granted an additional thirty (30) days from and after June 1st, 1914, within which to prepare, serve and file their proposed bill of exceptions herein. [237]

[Order Extending Time to and Including August 1, 1914, to Prepare etc. Bill of Exceptions.]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-ninth day of June, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 575—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAM YICK, et al.,

Defendants.

On motion of Geoffrey C. O'Connell, Esq., of counsel for defendants, and with the consent of Duke Stone, Esq., Assistant U. S. Attorney, of counsel for the United States, it is ordered that defendants be, and hereby are granted to and including August 1st, 1914, within which to prepare, serve and file proposed bill of exceptions herein. [238]

Southern District of California, do hereby certify the foregoing two hundred and forty (240) typewritten pages, numbered from one (1) to two hundred and forty (240) inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Indictment, Arraignment and Pleas of Defendants, Minutes of Trial, Verdict of the Jury, Motion for a New Trial, Order Denying Motion for a New Trial, and the Judgment of the Court, Clerk's Certificate to Judgment-roll, Bill of Exceptions, Petition for Writ of Error, on behalf of both defendants, Assignment of Errors, Order Allowing Writ of Error and Supersedeas, Supersedeas Bond of Defendant Sam Yick, Supersedeas Bond of Defendant Jung Kim, Orders Extending Time to File Bill of Exceptions, and Praecipe for Record on Writ of Error, in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the plaintiffs in error by its attorneys of record.

I do further certify that the cost of the foregoing [241] record is \$130.25, the amount whereof has been paid me by Sam Yick and Jung Kim, *alias* Jung Chung, the plaintiffs in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 18th day of December, in the year of our Lord one thousand nine hundred and fourteen, and of our

Independence, the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of
America, in and for the Southern District of
California.

[Ten Cents Internal Revenue Stamp. Canceled
Dec. 18, 1914. Wm. M. Van Dyke.] [242]

[Endorsed]: No. 2542. United States Circuit
Court of Appeals for the Ninth Circuit. Sam Yick
and Jung Kim, *alias* Jung Chung, Plaintiffs in
Error, vs. United States of America, Defendant in
Error. Transcript of Record. Upon Writ of
Error to the United States District Court of the
Southern District of California, Southern Division.

Received December 19, 1914.

F. D. MONCKTON,

Clerk.

Filed January 2, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

**[Order Extending Time to August 1, 1914, to File
Record etc., in Appellate Court.]**

*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

SAM YICK and JUNG KIM, *alias* JUNG
CHUNG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of August, 1914.

Los Angeles, May 27th, 1914.

OLIN WELLBORN,
United States District Judge, Southern District of
California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Sam Yick and Jung Kim, *alias* Jung Chung, Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Enlarging Time to File Record, etc. Filed Jun. 2, 1914. F. D. Monekton, Clerk.

**[Order Extending Time to October 1, 1914, to File
Record etc., in Appellate Court.]**

*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

SAM YICK and JUNG KIM, *alias* JUNG
CHUNG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of October, 1914.

Los Angeles, July 28th, 1914.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Sam Yick and Jung Kim, *alias* Jung Chung, Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Enlarging Time to Docket Cause and File Record. Filed Jul. 30, 1914. F. D. Monckton, Clerk.

**[Order Extending Time to December 1, 1914, to File
Record etc., in Appellate Court.]**

*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

SAM YICK and JUNG KIM, *alias* JUNG
CHUNG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of December, 1914.

Dated at Los Angeles, September 28th, 1914.

OLIN WELLBORN,

United States District Judge, Southern District of
California.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Sam Yick and Jung Kim, *alias* Jung Chung, Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Enlarging Time to Docket Cause and File Record. Filed Sep. 30, 1914. F. D. Monckton, Clerk.

**[Order Extending Time to January 1, 1914, to File
Record etc., in Appellate Court.]**

*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

SAM YICK and JUNG KIM, *alias* JUNG
CHUNG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

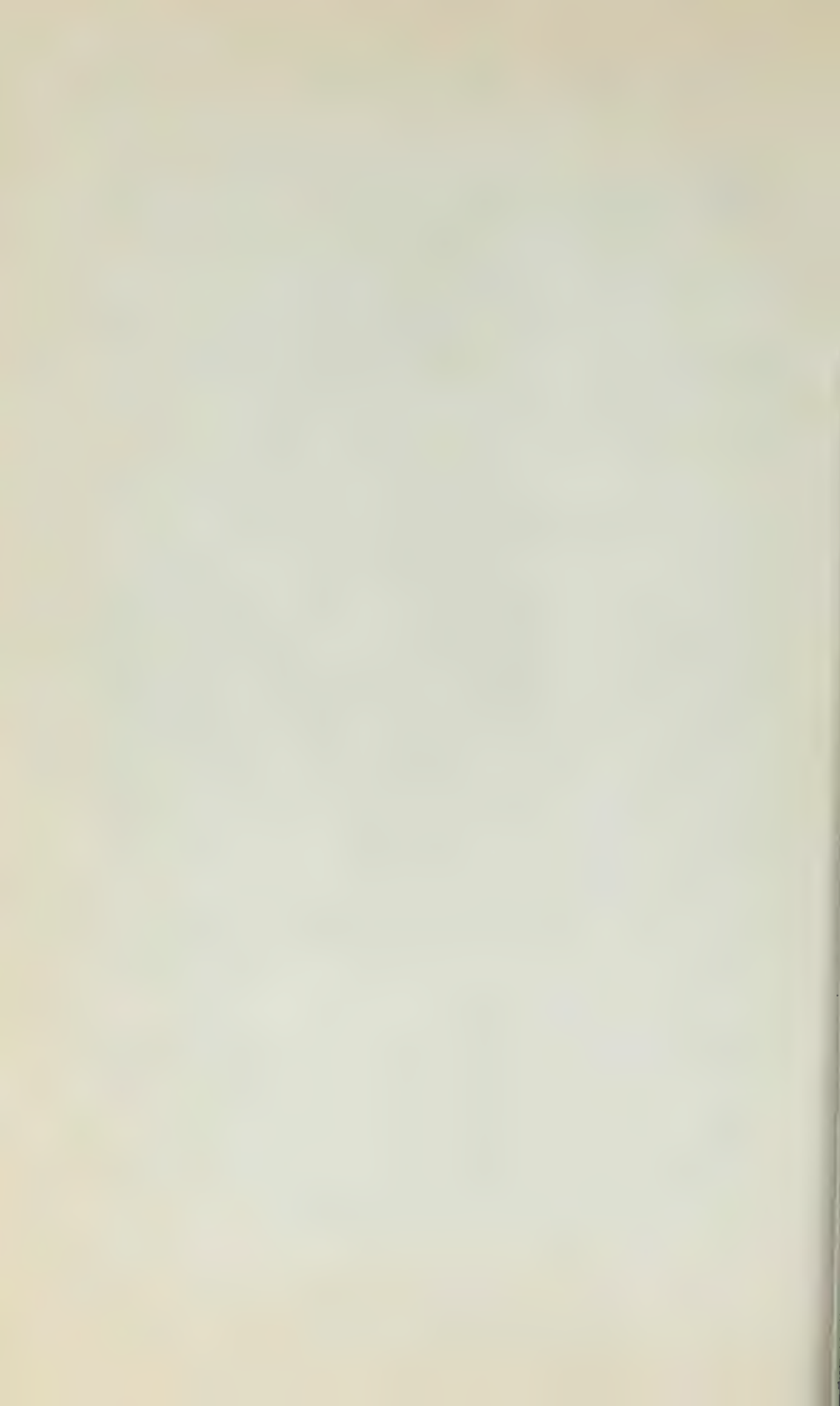
Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of January, 1915.

Dated at Los Angeles, November 30th, 1914.

OLIN WELLBORN,

United States District Judge, for the Southern District of California.

[Endorsed]: No. 2542. United States Circuit Court of Appeals for the Ninth Circuit. Four Orders Under Rule 16 Enlarging Time to Jan. 1, 1915, to File Record Thereof and to Docket Case. Refiled Jan. 2, 1915. F. D. Monckton, Clerk.



No. 2542.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Sam Yick and Jung Kim, alias
Jung Chung,

Plaintiffs in Error,

vs.

United States of America,

Defendant in Error.

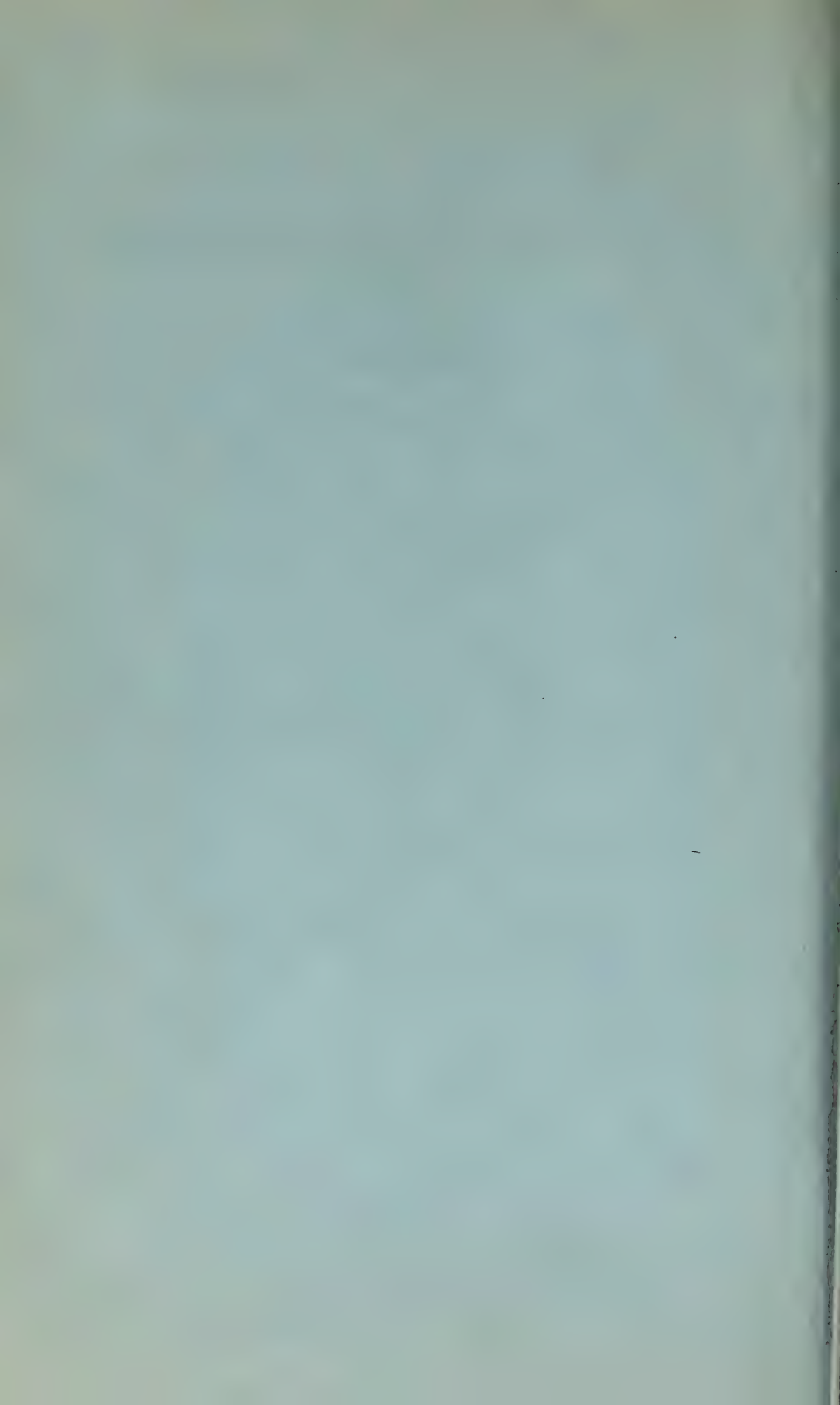
BRIEF OF PLAINTIFFS IN ERROR.

MOTT & DILLON,
ISIDORE B. DOCKWEILER;

Attorneys for Plaintiffs in Error.

THOMAS A. J. DOCKWEILER,
G. C. O'CONNELL,

Of Counsel.



No. 2542.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

**Sam Yick and Jung Kim, alias
Jung Chung,**

Plaintiffs in Error,

vs.

United States of America,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

THE FACTS.

Plaintiffs in error were convicted under an indictment which charged them with conspiring to bring from Mexico into the United States certain Chinese persons who were not entitled to enter or remain therein.

The actors in the alleged conspiracy were:

Sam Yick, for thirty-one years a peaceful, reputable merchant and citizen of Bakersfield, California [Tr. pp. 192-206].

Jung Kim, who helped in Sam Yick's store.

Edward T. Morse, United States government inspector of immigration at Bakersfield.

A. G. Bernard, United States government inspector of immigration at San Diego, California.

Charles T. Connell, head of the United States immigration office at Los Angeles, California, and the immediate official superior of Morse and Bernard.

Morse was sent to Bakersfield in January, 1911. He there met Sam Wick, frequented his store, consulted him on matters affecting local Chinese [Tr. pp. 43, 44], and used him occasionally as an interpreter [Tr. p. 75]. Morse says that on May 8, 1911, in a conversation with Sam Yick, Sam told him how easy it would be to make some money smuggling Chinese in from Mexico. Morse at once fell in with the plan and agreed to help Sam [Tr. p. 78]. So anxious was he that Sam Yick should carry this idea into execution, that he went at once to Los Angeles to see Mr. Connell, his superior officer, and there a plan was initiated to trap Sam Yick [Tr. pp. 86-87-88-89]. Two government officials were now actively engaged in the plot, but to insure success it was necessary to have still another, so *A. G. Bernard* was summoned to Los Angeles by Connell [Tr. p. 117] and the plan unfolded to him. This was on May 22, 1911. So zealous a conspirator does Bernard appear to have become almost at once, that, not having heard anything since his interview with his superior, and fearing that after all Sam Yick might not be enticed into crime, he wrote a letter on June 23, 1911, calling attention to the Sam

Yick plot, in which he had become an arch conspirator, and saying that the time was now very favorable to put the scheme into operation [Tr. p. 118]. Connell and Morse between them [Tr. pp. 89, 91] suggested that Bernard should go to Bakersfield and make the acquaintance of his intended victims. Accordingly a meeting was held in Sam Yick's store on August 24, 1911, at which were present Sam Yick, Morse and Bernard. Jung Kim was brought in later and introduced as "the guide" who would lead the Chinese over from Tia Juana. It was the express intention of both Morse and Bernard, as they walked to this meeting together, to entrap Sam Yick and Jung Kim and to get them so far in the toils that their conviction of a crime would be easy [Tr. p. 113]. With this end in view ways and means of effecting the object of the conspiracy were suggested to the Chinaman by both of these government officials. Morse suggested the marked card system whereby the Chinese brought over were to be identified [Tr. pp. 91-2]. It was arranged that Jung Kim should go to San Diego and on his arrival telephone Bernard [Tr. p. 80]. To make sure that Jung Kim really went to San Diego, Morse was at the station to see him off and examine his ticket [Tr. p. 81]. Bernard suggested the route by which the Chinese should be brought over [Tr. p. 104]. Bernard met Jung Kim on his arrival in San Diego, accompanied him to Tia Juana on a tour of inspection [Tr. pp. 106, 107], in fact was with him wherever he went [Tr. p. 116], accompanied him, with another government inspector, on the night when the Chinese

were to be brought over [Tr. p. 108], but, unfortunately for the success of his scheme, Jung Kim was left to his own devices a mile or so on the American side of the line, with the result that he came back without any Chinese [Tr. pp. 108, 109], the brains of the conspiracy were absent for a brief period, and the scheme collapsed.

No Chinamen were brought over. Jung Kim appeared at the place on the American side of the line where Bernard and another inspector were waiting for him, but no Chinese came with him. The government officers were there waiting to apprehend any Chinese who might come over, hold them as witnesses against these defendants, and then deport them. Thus the commission of the crime would have been prevented. Three Chinese did, however, find their own way over by another route and were arrested on the streets of San Diego a day or two later.

SPECIFICATIONS OF ERRORS.

I.

The Giving of the Instruction Set Out Below is Prejudicial Error for Which the Judgment Will be Reversed Under the Authority of *Woo Wai vs. United States*.

Under this state of the evidence the court gave to the jury the following instruction:

“The court further instructs you that the fact, if it be a fact, that government officers incited or aided defendants to commit the crime charged against them, if they did commit it, is no bar to a prosecution by

the government. The court further instructs you that persons engaged in a criminal conspiracy such as here charged may be held guilty of the crime even though they were incited to it by government officers or were acting in the belief that government officers or agents were co-operating with them, and notwithstanding the parties so engaged were depending upon such officers to protect them from arrest and to aid in carrying out the objects of a conspiracy.

“If, therefore, you find from the evidence beyond a reasonable doubt that there was a conspiracy between the defendants as alleged in the indictment, and that the defendant Jung Kim committed either of the overt acts therein charged it will be your duty to find the defendants guilty, and notwithstanding officers of the government participated, if they did participate in any of the acts committed by the defendants or either of them.”

The defendants excepted to the giving of this instruction and assigned the same as error. [Tr. p. 241.]

The giving of this instruction is error for which the judgment will be reversed.

Woo Wai v. United States, 223 Fed. 412.

The Woo Wai case is the most recent expression of the views of this court on the subject of incitement and entrapment, and the views therein expressed must, we submit, control in the decision of the case at bar.

The Woo Wai case holds:

First: That it is against public policy to sustain a conviction obtained by incitement and entrapment. In

support of this view numerous cases are cited and discussed in the opinion, amongst others,

O'Brien v. State, 6 Tex. App. 665;

Commonwealth v. Bickings, 12 Pa. Dist. R. 206;

Love v. People, 160 Ill. 501, 43 N. E. 710;

Commonwealth v. Wasson, 42 Pa. Super. Ct. 38;

Saunders v. People, 38 Mich. 218;

People v. McCord, 76 Mich. 200, 42 N. W.
1106.

To these we may add:

State v. Dudoussat, 47 La. Ann. 977, 17 A. and
E. Ann. 296;

People v. Draisted, 13 Colo. App. 532, 58 Pac.
796;

U. S. v. Healy, 202 Fed. 350;

U. S. v. Whittier, 28 Fed. Cas. p. 594, Case
No. 16,688;

Connor v. People, 18 Colo. 373, 25 L. R. A.
348;

U. S. v. Adams, 59 Fed. 677;

U. S. v. Jones, 80 Fed. 513

“It must be conceded that contrivances to induce crime (the contriver confederating for the purpose with the criminal) are most rigidly scrutinized by the courts, even when the contrivances are lawful in themselves. But when the contrivances are of an unlawful character, should courts not be even more strict?

“No court should, even to aid in detecting a supposed offender, lend its countenance to a vio-

lation of positive law, or to contrivances for inducing a person to commit a crime.”

U. S. v. Whittier, 28 Fed. Cases, p. 594, Cas. #16688.

“The government agent was therefore not engaged in detecting crime, but in procuring its commission.

“These facts tend to show that the accused was reluctant to act in the particular transaction, and the fact adds to the reprehensible character of the conduct of the prosecuting witness. There is no case which goes so far as to allow a conviction upon such a state of facts.”

U. S. v. Adams, 59 Fed. at p. 677.

“There is something repugnant in the idea of the government, by art and contrivance, entrapping one of its citizens into the commission of crime in order to subject him to criminal prosecution; and such prosecutions have been felt by the courts to be more or less objectionable in morals and in policy. * * * But to go further, and after the citizen has been seduced by the government into robbing the mail, to prosecute him criminally for the act is more or less offensive to public sentiment.”

U. S. v. Jones, 80 Fed. 513-514.

The case at bar is not analogous to the case of the employment of detectives to secure evidence or of sending decoy letters to ascertain whether a crime has or was about to be committed. It is a case of the officials of the government displaying a morally un-

wholesome zeal and anxiety to make criminals of two upright, reputable and honorable citizens.

SECOND: The decision in the Woo Wai case, in addition to the ground of sound public policy just noted, was also based on the fact that the evidence fell short of showing that there was in fact a conspiracy to commit a criminal act within the meaning of section 5440. "It was the intention of the officers who induced Woo Wai and his associates to attempt to bring Chinese across the Mexican border *that the law should not be violated*. They intended to prevent the consummation of the offense which they lured the defendants to undertake."

An exactly similar situation exists in the case at bar. The government officers Bernard and Neilsen who were operating with Jung Kim around San Diego and Tia Juana, intended to prevent any violation of the law. So also did Morse. As said in the Woo Wai case, "their purpose was to intercept the Chinese so brought across the border and return them to the country from whence they came." The acts of the defendants were not to result in an accomplished offense against the laws of the United States. For this reason also the judgment should be reversed.

Woo Wai v. United States, *supra*.

As to sufficiency of
Exception to instruction See
waiver of Counsel for respective
parties and court order in minutes
of court page 32 of Transcript of
Record.

II.

The Demand for the Return to the Defendants of the Letters Taken by the United States Attorney and the Immigration Officials From the Trustee in Bankruptcy Should Have Been Granted.

There were introduced in evidence by the government certain letters, nine in number, and which appear in the Transcript at pages 174 to 191, which papers were taken from the store of the defendant in Bakersfield by the sheriff by virtue of a writ of attachment and were subsequently taken from the sheriff by the trustee in bankruptcy of the Sam Yick Company, and were, by said trustee, turned over to the government immigration officials in Los Angeles. Immediately upon the production of the letters in court counsel for the defendants made a demand on the government for the immediate and absolute surrender of all of the documents to the defendants. [Tr. p. 150.] This demand was refused [Tr. p. 168] and the refusal was assigned as error [Tr. p. 239].

The refusal of this demand is a violation of the constitutional rights of the defendants secured them by the fourth and fifth amendments to the Constitution of the United States, which provide:

(a) That a person shall be secure against unreasonable seizure and searches.

(b) That a person shall not be compelled to be a witness against himself in a criminal case.

The constitutional privileges include protection from the necessity of producing documents or chattels in re-

sponse to a subpoena *duces tecum* or *other and equivalent form of process*, treating him as a witness, or the articles or chattels as subjects of evidence because at any time he might be called upon to establish the identity, authenticity, or origin of the article produced.

State v. Fuller (Mont.), 85 Pac. 369, 8 L. N. S. 762, 9 Ann. Cas. 648;

Thornton v. State (Wis.), 93 N. W. 1107, 98 Am. St. 924.

In order to bring the evidence within the constitutional restriction it must be produced under *compulsion*.

State v. Newcomb (Mo.), 119 S. W. 405;

Blum v. State (Md.), 51 Atl. 26, 56 L. R. A. 322;

McKnight v. U. S., 115 Fed. 972.

Such wrongful compulsion is exercised in violation of the 5th amendment, and the 4th amendment, forbidding unreasonable searches and seizures, is also violated by a statute compelling a defendant or claimant in a proceeding for the forfeiture of goods alleged to have been fraudulently imported to produce in court his private books, papers and invoices on penalty of having the allegations of the bill against him taken *pro confesso*.

Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746.

An order for the production of private books of account is such a compulsion.

Blum v. State (Md.), 51 Atl. 26, 56 L. R. A. 322.

In this latter case (*Blum v. State*) the Maryland Court of Appeals held that the *account books* of one charged with having obtained money under false pretenses were not admissible against defendant under the rule protecting him from giving evidence against himself, although such books were voluntarily turned over to receivers appointed by the court in a proceeding to which the accused consented.

The facts in this case are almost identical with those in the case at bar. The receiver in the *Blum* case, after qualifying, went to defendant's store and took over the keys from the constable who was in charge under an attachment and took possession of everything in the store, including the books. In the case at bar the letters in question were taken by the trustee in bankruptcy from the sheriff, who had taken them under a writ of attachment [Tr. p. 153], and subsequently turned them over to the United States immigration inspector in Los Angeles.

The case of *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, is, we respectfully submit, absolutely determinative of the right of the defendants here to have their demand for the return of these letters granted. In the *Weeks* case, *supra*, the defendant was arrested by a police officer without warrant; other police officers went to his house, were told where the key was by a neighbor, found it, and entered the house. They searched the defendant's rooms and took various papers, etc., which were afterwards turned over to the marshal. Later in the day the same police officers

returned with the U. S. marshal and, being admitted by someone in the house, searched the defendant's room and carried away letters and envelopes found in a drawer. Neither the police nor the marshal had a search warrant. Before the trial and at the trial the defendant demanded the return of these papers, which was refused, and they were introduced in evidence against him. The Supreme Court held this to be prejudicial error and reversed the conviction. We quote from the opinion:

“The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are,

are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused. In *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575, 24 Sup. Ct. Rep. 372, this court said that the 4th amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. *Boyd case*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action. * * *

"We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed."

also:

S., v. Abrams, 230 Fed. 313,

S., v. Wong Quong Wong, 94 Fed. 332.

tion were, as we have seen, first taken by the sheriff under a writ of attachment, were by him turned over to the trustee in bankruptcy, who in turn, on the order of the United States district attorney, delivered them to the immigration inspector at Los Angeles. [Tr. pp. 150-159 and 160-165.]

Now, while under the decision in the Weeks case we contend that it makes no difference whether the possession was or was not unlawful, yet it is apparent to us that in this case it was unlawful. Assuming that the sheriff's seizure was lawful, though the property was not subject to attachment under C. C. P. 690, and assuming that the trustee in bankruptcy rightfully took possession of the papers, yet his action in turning them over to the immigration officials was absolutely unjustified. As remarked in the Weeks case, 'not even an order of court would have justified such procedure,'

much less an order of the district attorney. [Tr. pp. 162-164.] The papers were merely in the temporary custody of the trustee in bankruptcy. If they were assets of the estate he held title to them for the benefit of the creditors, and he violated his trust in turning them over to any other person; if they were not assets—and they very evidently were not—the most that can be said is that by virtue of his office he obtained temporary access to and control over them, but having determined that they were in no sense assets of the estate he should at once have returned them to the bankrupt, and his possession of them thereafter was unlawful. We say, then, that the taking of these documents was unlawful because:

(a) The trustee in bankruptcy never acquired any title to them. He could obtain title only to such property as is set out in section 70 of the Bankrupt Act (Fed. Stats. Ann., pp. 697-8). Subdivision *one* of this section is the only portion applicable to property of this kind, and it gives the trustee title to "*documents relating to his (the bankrupt's) property.*" An inspection of the letters in question, which appear in the Transcript at pp. 174-191 as United States Exhibits 12 A to 12 M, inclusive, shows that they are private letters, in no way relating to the bankrupt's property.

(b) The trustee was divested of any title he may have had by his discharge and the termination of the bankruptcy proceedings, which occurred in November, 1912.

(c) And lastly, the letters were not produced by the trustee in bankruptcy but by the United States attor-

ney [Tr. p. 149], who presumably secured them from the government immigration officials, to whom they were delivered by the trustee [Tr. p. 163]. Neither the government attorneys nor the immigration officials procured these papers lawfully, the trustee had no authority to turn them over. There was not even an order of court directing him to do so, though even that would not have sufficed under the authority of the Weeks case. The papers were brought from Bakersfield to Los Angeles by the trustee on the order of the United States attorney's office [Tr. p. 162], and were apparently, without any other formality, left with immigration officials. [Tr. p. 163.] The trustee himself was not in lawful possession of the papers.

III.

The Letters Marked United States Exhibits 12A, 12B, 12C, 12D, 12E, 12F, 12G, 12H, 12I, 12J, 12K, 12L, 12M, Introduced by the Plaintiff, were, and Each and Every One of Them was, Improperly Admitted in Evidence Against the Objections of Each of the Defendants.

These letters were found in a tin box taken by virtue of a writ of attachment by the sheriff of Kern county from the store of the Sam Yick Company at Bakersfield, were subsequently turned over by the sheriff to Charles E. Kruse, trustee in bankruptcy of the Sam Yick Company, and by said trustee delivered to the government immigration officials in Los Angeles. The introduction in evidence of each and every one of these letters was objected to by each of the defendants. We

will briefly consider each letter in the order in which they appear in the transcript.

1. On Tr. p. 174 appears United States Exhibit 12J. This is a letter addressed to *Mr. Deang Coy* and signed by *Quan Ching Lim*, and there appears underneath this signature the words "To Sam Yick Company, Riverside." The letter is dated April 13, 1911. There is nothing to show where or when the letter was mailed. The letter refers to "a *countryman at your place* who desires to come to the United States," and mentions ways and means of getting him into the United States without being caught by the immigration officials. That the contents of the letter were injurious to the defendants is apparent. It will be noted that the letter

(a) Is not addressed to the defendants or either of them.

(b) It is not signed by the defendants or either of them.

(c) It is not shown to have been in the possession of the defendant Sam Yick or the defendant Jung Kim. It in no way refers to *either* of the defendants.

(d) No connection whatever is shown between either of the defendants and the addressee or signer.

(e) The letter is dated April 13, 1911, but it does not appear when or where it was mailed. The government contends that it corroborates Sam Yick's statement to Morse on May 8, 1911 [Tr. p. 46], that he had certain letters from friends who wanted to come over. But this statement was confined to friends in *Juarez*, Mexico [Tr. p. 46], and there is no mention of *Juarez* in the letter and no proof that it came from

there. The fact that the letter was dated April 13, 1911, is no proof that it was in Sam Yick's possession on May 8, 1911, or that he had received it at that time. The letters were not found in the Sam Yick Company store until October, 1911. [Tr. p. 158.] Nothing was done in furtherance of any of the matters charged in the indictment after the end of September, 1911.

(f) If it is contended that the letter was in reality intended for Sam Yick or Jung Kim, though addressed to another, this is refuted by the contents, because the letter speaks of "a countryman *at your place*." Now, Sam Yick's place, and also Jung Kim's, was at Bakersfield, and the *countryman* referred to would therefore already be in the United States.

(g) The Sam Yick Company, Riverside, is not shown to be in any way connected with either of the defendants.

2. The next letter is United States Exhibit 12L, appearing in the Transcript on p. 177. This letter is addressed to "*Brother Jock Coy*," and signed "*Jock Toh*," stamped "*Deang Jock Toh*," and dated April 7, 1911. The letter refers to smuggling. All of the remarks numbered a, b, c, d and e, made with reference to the previous letter, Exhibit 12J, are applicable to this one.

3. The next letter is U. S. Exhibit 12K, and is found in the transcript on page 179. This letter is addressed to "*Brother Jock Coy*" and signed "*Deang Jock Toh*," dated April 14, 1911. This letter also refers to smuggling of Chinese. And remarks a, b, c, d and e, above noted, are applicable to it also.

4. The next letter is U. S. Exhibit 12I, and appears on pp. 182 and 183 of the transcript. It is addressed to "*Jock Coy Father*" and signed "*Jeung Foo On*," dated June 4, 1911, and addressed on the envelope, "*Please deliver to 'Deang Jack Toy.'*" All of the remarks a, b, c, d and e, above made with reference to Exhibit J, are applicable to this letter. And it will further be noticed that the date is subsequent to the conversation of Morse, the government inspector, with the defendant Sam Yick, which occurred May 8, 1911. [Tr. p. 44.]

5. The next letter appears in the Transcript at p. 184 as U. S. Exhibit 12D. It is addressed to "*Friends Jock Gim and Jock Coy*" and signed "*Jeung Jenck Bing*," and dated June 1st, 1911. Remarks a, b, c, d and e, above made, are applicable to this letter also.

6. U. S. Exhibit 12H, appearing in the Transcript at p. 185, is the next letter. This is addressed to "*Brother Jock Coy*" and signed "*Deang Jock Toh*," and dated June 13, 1911. It refers to "paying somebody money for getting me over to your place" and to the fact that the writer should get started soon and would write home after he had "*crossed*." The same remarks a, b, c, d and e are applicable to this letter also.

7. The next letter appears in the Transcript at p. 187 as U. S. Exhibit 12M. It is addressed to "*Brother Jock Coy*" and signed "*Deang Jock Toh*," from Ensenada, dated Sept. 2, 1911, and addressed on the envelope, "Deliver this to Sam Yick Company of Bakers-

field." Remarks a, b, c, d and e, above made, apply to this letter also.

8. The next letter is U. S. Exhibit 12A and appears in the Transcript at pp. 188 and 189. It is addressed to "*Brother Jock Coy*" and signed "*Deang Jock Toh*," dated Sept. 3, 1911, addressed on the envelope, "*Important letter for Mr. Deang Jock Gim*, the address being "Sam Yick Kim Kee Co. Phone Main 113, P. O. Box 363, 723, 18th street, Bakersfield, Cal." The same remarks a, b, c, d and e apply equally to this letter, and it will further be noticed that on the envelope it expressly states it is for "*Deang Jock Kim*," who is in no way connected with either of the defendants as far as the record shows.

9. The next letter is U. S. Exhibit 12G, and appears in the Transcript on p. 191. It is addressed to "*Jock Coy*" and signed "*Quong You*," dated Sept. 2, 1911. Remarks a, b, c, d and e, above made, apply equally to this letter.

Nearly all these letters refer directly or indirectly to the bringing of Chinese into the country. They were all introduced in evidence by the government and read to the jury over the objections of each of the defendants. Their introduction was undoubtedly highly prejudicial to the defendants. Each of the defendants objected to the introduction of the letters and of each and every one of them. We submit that such evidence as this is clearly incompetent and inadmissible. The only connection of any kind shown by the record between these letters and either of the defendants is the fact that in October, 1911, they were found in a

tin box in a store occupied by the defendant Sam Yick. There is no evidence as to how the letters got there, or when. They are not shown to have been mailed at any particular place or time, or at all. The theory on which the government offered them in evidence was that they supported Sam Yick's alleged statement to Morse, the government inspector, made on May 8, 1911, that he had letters from certain people in Juarez, Mexico, who wanted to come over to the United States. Is the finding of the letters in question in the defendant's store four or five months thereafter, without any showing of how or when they got there, any corroboration of this statement. Not one of the letters is shown to be from Juarez. Nor is a single one of the letters addressed or signed by either of the defendants. On the envelope of some of them the name "Sam Yick Company" or "Sam Yick Kim Kee" appears. But what does this signify? To begin with, the record is silent as to any connection of defendant Sam Yick with either of these companies; and the defendant Jung Kim is, without a doubt, a total stranger to either of them, as far as the record shows. Assuming, however, that the defendant Sam Yick is one and the same with Sam Yick Company and Sam Yick Kim Kee Company, what significance is to be gathered from the fact that these names appear on some of the envelopes? The letters themselves are not addressed to either Sam Yick or Jung Kim. The government's own witness, Morse, testified that the Chinese of the vicinity kept their papers at Sam's store [Tr. p. 75]. The evidence further shows that Sam Yick ran an employment bureau

[Tr. pp. 194-5, 204] and furnished Chinese labor [Tr. pp. 199, 200]. His store was the headquarters for Chinese in that vicinity. No proof of ownership of these letters was made other than the finding of them in a box at defendant's store. No demand was made for their return [Tr. p. 158] until their sudden and unexpected appearance at the trial. Unquestionably the letters were left in the store by or for some of the numerous Chinese who made their headquarters there. Are they, then, proper and competent evidence against these defendants? They are clearly hearsay and utterly incompetent, and their introduction should not have been permitted.

Furthermore, even if we assume that the letters were addressed to the defendants, or either of them, yet there is no evidence at all to show that the defendants read them or that they acquiesced in any manner in their contents, or that they acted on any information contained in them or that by their acts or conduct they invited the sending of them. It is not contended that the defendants, or either of them, wrote the letters, and if it were there is no evidence to support the claim. Under this state of facts the following authorities support the view that these documents were hearsay, incompetent, and should not have been admitted in evidence, to-wit:

An unanswered letter *from a third person* to the defendant, found in the possession of the defendant when arrested, is hearsay and inadmissible evidence against the defendant, and the possession of it is not

evidence of acquiescence of the defendant in its contents, so as to make its contents evidence against him, where it is not shown that the defendant acted upon any information contained in the letter, or by his acts or conduct invited the sending of it to him.

People v. Colburn, 105 Cal. 648.

Approved in

Sorenson v. U. S., 168 Fed. 796.

Letters found upon a Chinese prisoner charged with murder, written from one Chinese society to another, giving warning of his probable arrest, and requesting direction to him that he might change his residence, are inadmissible, in the absence of proof tending to connect him with the sender, and to show that he acted on their contents.

People v. Lung, 129 Cal. 491.

An unanswered letter found in the pocket of a prisoner on his arrest is *not* competent evidence. Silence cannot, in such case, be considered an admission of matters referred to in the letter.

People v. Green, 1 Parker Cr. R. 11.

On a trial for murder, letters were produced which were found in possession of the prisoner, written to him by the deceased, and sister and daughter of the deceased, tending to show knowledge by the writers of improper relations between the prisoner and the daughter, but no evidence was introduced to show that the

letters were in response to any by the prisoner. *Held* that they were inadmissible, being *mere hearsay*.

Willett v. People, 27 Hun. (N. Y.) 469.

Where in a prosecution under Rev. St. U. S., section 5480, making it a penal offense to defraud by means of the postal service, the government seeks to show that the defendant fraudulently offered to provide places for unemployed teachers, *letters in reply* to those written to schools in reference to alleged vacancies are not admissible in evidence against a party who has not expressly referred another to him for information in regard to a disputed matter.

Bass v. U. S., 20 App. D. C. 232.

In a homicide case a letter to the county attorney written by a person with whom defendant was living, protesting her innocence, expressing a desire that defendant be punished, and promising to make disclosures, is incompetent.

State v. Rocker (Ia.), 106 N. W. 645.

In a prosecution for forging a certain deed, a postal card purporting to have been written by the recorder and addressed to a third person was hearsay and inadmissible for any purpose.

State v. Minton (Mo.), 22 S. W. 808.

Letters written by the person injured or by third persons, addressed to the accused and received by him, but never answered or acted on by him, are inadmissible unless they are part of the *res gestae*.

12 Cyc. 434.

See also;

U. S. vs. Wong Quong
Wong, 94 Fed. 832,
U. S. vs. Abrams,
230 Fed. 313.

"Were such evidence admissible against a defendant charged with crime, there would be no limit to the power of designing persons to manufacture testimony against their neighbor."

We desire to call attention to the fact that each of the defendants severally objected to the introduction of these letters, and if it should be held that there is some evidence connecting them with defendant Sam Yick, the record is still absolutely bare of any evidence involving the defendant Jung Kim with them in any manner. The admission of these letters was assigned as error [Tr. p. 240].

In Conclusion.

It is quite apparent that no matter where the scheme originated, it required not only the intelligent direction and necessary co-operation but the insistent and never ceasing persuasion, amounting almost to compulsion, of the government officials to insure the taking of even a single effective step towards the consummation of the plan. The principles of sound public policy, then, have been violated by the detestable and insufferable actions of government officials in procuring these defendants to commit a crime. The constitutional rights of these defendants have been violated by the seizure of their private papers and the refusal to surrender them on demand. And in addition the subsequent introduction of these papers in evidence against the defendants was not only a further violation of

their constitutional rights but was also, for other reasons as above pointed out, an error highly prejudicial to them. For these reasons the judgment should be reversed.

Respectfully submitted,

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UNITED STATES
Circuit Court of Appeals
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ALIAS JUNG CHUNG,
Plaintiffs in Error.

vs.

THE UNITED STATES OF
AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

ALBERT SCHOONOVER,
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Counsel for Defendant in Error.

No. 2542

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BRIEF OF DEFENDANT IN ERROR.

There are three assignments of error relied upon by plaintiffs in error in their brief for a reversal of the judgment of the trial court. The first assignment

relates to the giving of an instruction to the jury by the trial court. The second assignment of error alleges as error the refusal of the trial court to order a return of certain papers taken from the store of one of the defendants by the sheriff of Kern County under a writ of attachment, and offered by the Government on the trial of the case, no demand having been made for the return of the papers prior to the trial. The third assignment of error relates to objections to the introduction by the Government of the letters which were made the subject of the second assignment of error, the third assignment of error, however, being based upon alleged incompetency of the letters.

FIRST ASSIGNMENT OF ERROR.

The order of these assignments seems to be somewhat reversed, but we present them in the order in which they are presented in the brief of plaintiffs in error.

In this connection we desire to call the court's attention to the fact that the first assignment of error of plaintiffs in error should be disregarded for the reason that the exceptions to the instructions of the trial court were not properly taken and preserved. The bill of exceptions shows that the only exception taken to the instructions of the court was a general exception to each and every one of the instructions as given by the court (Tr. p. 227), and the rule of law of course is very well settled that a general exception of that kind to instructions given will not be considered by an appellate court.

In order that exceptions to instructions of the court as given can be considered by the appellate court, it must appear from the transcript on appeal that the particular exception to the particular instruction as given was called to the trial court's attention before the retirement of the jury from the box, and it must also appear that the grounds of the exception were called to the trial court's attention. As stated by the Circuit Court of Appeals of the 8th Circuit in the case of *Price vs. Pankhurst*, 53 Fed. 312, this rule of law is for the purpose of giving the trial court an opportunity to correct any mistakes inadvertently made in the charging of the jury. As heretofore stated, the transcript in this case affirmatively shows that no such action was taken by the plaintiffs in error in this case. It does not appear from the transcript that the trial court's attention was particularly called to the grounds of the objection to the particular instruction complained of as the first assignment of error of plaintiffs in error, and, as a matter of fact, it was not done, as is shown by the transcript on page 227, wherein it is said as follows:

"The court thereupon gave and read to the jury the instructions hereinafter immediately set forth, to the giving of each and every one of which instructions the defendants and each of them duly excepted."

The above quotation is taken from the bill of exceptions and clearly shows that the only exception preserved by plaintiffs in error was a general exception to the giving of each and every one of the

instructions without advising the trial court of any particular instruction to which they excepted or of any particular ground upon which they excepted to any particular instruction.

It might be mentioned in passing that while the bill of exceptions shows certain instructions requested by the defendants, or plaintiffs in error, and refused by the court, plaintiffs in error have evidently abandoned the same, as no mention is made of them in their brief. However, the transcript, page 219, shows that the only exception taken to the refusal of the court to give said instructions was also a general ~~instruction~~^{exception}, in words as follows:

“Thereupon the defendants requested the court to give to the jury the instructions hereinafter immediately set out, which request was by the court refused, as to each and every one of said instructions, to each and every one of which refusals the defendants and each of them duly excepted.”

It is respectfully submitted that under the case of *Holder vs. United States*, 150 U. S. 91, decided by the Supreme Court of the United States, the failure of the defendants or plaintiffs in error to call the trial court's attention specifically to the grounds of objection to the particular instruction as given precludes the appellate court from considering such exception upon appeal and that the trial court is without power to relax the rule.

In the case of *Holder vs. United States*, 150 U. S. 91, Chief Justice Fuller, writing the opinion of

the court, said, in part:

“There is no pretense that the charge of the court, occupying twenty-four pages of the printed record, was erroneous in every part, and no objection to any particular part is shown. The rule is that a general exception to a charge, which does not direct the attention of the court to the particular portions of it to which objection is made, raises no question for review. *Burton v. West Jersey Ferry Co.*, 114 U. S. 474; *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 488; *Lewis v. United States*, 146 U. S. 370.”

It will be noted that the exception as preserved in the bill of exceptions and quoted above on page 227 of the transcript is that “to the giving of each and every one of the instructions, defendants and each of them duly excepted.” This identical exception was passed upon by the Circuit Court of Appeals of the 8th Circuit in the case of *Baggs vs. Martin, et al*, 108 Fed. 33, wherein that court said, in part, as follows:

“The first three errors assigned relate to instructions given and refused. But these alleged errors cannot be considered, because no sufficient exception was taken to the instructions given, or to the refusal to give those asked by the defendant. To a series of instructions, embracing several separate and distinct propositions, asked by the plaintiff and given by the court, only one of which is assigned for error or claimed to be erroneous, the only exception taken was: ‘To the giving of the instructions

asked by the plaintiffs, and to each and every thereof, defendant then and there duly excepted.' To a series of instructions, embracing nine separate and distinct propositions, asked by the defendant and refused by the court, the only exception taken was in these words: 'To the refusing of which instructions defendant by his counsel duly excepted.' These exceptions were not sufficient, for reasons so often stated by this and other courts as not to require repetition. *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Price v. Pankhurst*, 10 U. S. App. 497, 53 Fed. 312; *Association v. Lyman*, 60 Fed. 498. In the last case cited, an exception in this form, 'To the giving of each and all of which instructions the defendant, by its counsel, then and there excepted,' was held to be of no avail. *Anthony v. Railroad Co.*, 132 U. S. 173; *Railway Co. v. Johnson*, 54 Fed. 481; *Philip Schneider Brewing Co. v. American Ice Machine Co.*, 77 Fed. 147; *Shelp v. United States*, 81 Fed. 700; *Holder v. United States*, 150 U. S. 91; *Lewis v. United States*, 146 U. S. 370; *Iron Co. v. Blake*, 144 U. S. 476.

The case of *Ball vs. United States*, 147 Fed. 32, decided by this court, is also in point; in that case, before Justices Gilbert, Ross and District Judge Hawley, in an opinion by Justice Gilbert, it was said in part, reading from page 43:

"We think that the most that can be said against the instruction is that it is open to the objection that a portion of it assumes the existence of evidence which is not in the record, evi-

dence that the deceased at the time when he was shot was attempting to retreat through the door, but the objection was not confined to that part of the charge. It was directed to an entire paragraph, portions of which were not subject to objection, and it did not point out the defective portion, so as to bring it to the attention of the court, and thus afford an opportunity to remedy it. Such an exception will not be considered in an appellate court. *Cass Co. v. Gibson*, 107 Fed. 363; *Columbus Construction Co. v. Crane*, 98 Fed. 946; *Railroad Co. v. Varnell*, 98 U. S. 479, 25 L. Ed. 233; *Mobile and Montgomery R. Co. v. Jurey*, 111 U. S. 584; *Newport News and Miss. Valley Co., v. Pace*, 158 U. S. 36, 39 L. Ed. 887."

It has been held by the Circuit Court of Appeals for the 8th Circuit in *Price vs. Pankhurst*, 53 Fed. 312, in construing Rule 10 of that court, which is identical with Rule 10 of the rules of this court, in part, as follows:

" 'The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.' Rule 10, 47 Fed. Rep. vi. 1 C. C. A. xiv.

“This rule was designed to put an end to allowing bills of exceptions like the one in this case. It matters not that the judge may be willing to consent to such a bill. *He cannot waive the rule, so far as it relates to specific exceptions, if he desires to do so. The rule is not made for the judge's personal protection or benefit, but for the protection of suitors and the advancement of justice.* It is the duty of the party excepting, to call the attention of the court distinctly to the parts of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. The practice which it has been intimated at the bar sometimes obtains of taking a general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. *The rule is mandatory. Its enforcement does not rest in the discretion of the lower court.* Its enforcement is essential to the proper and intelligent administration of justice. It serves to correct hasty, inaccurate, or misleading expressions in the charge; it affords an opportunity for explanations and qualifications which might otherwise be overlooked, and sometimes, by removing the ground of exception, prevents further litigation. It is, of course,

the duty of the court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging a jury. No part of the trial should be conducted more deliberately and carefully, and no court will refuse a party time and opportunity to point out distinctly his exceptions to the charge before the case is finally given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards. There being no error on the face of the record, and no error saved by the bill of exceptions, the judgment of the circuit court is affirmed."

To the same effect are the following cases:

Burton v. West Jersey Ferry Co., 114 U. S. 474;
Hinchman v. First National Bank, 112 Fed.
391;

St. Louis I. M. & S. Ry. Co. v. Spencer, 71
Fed. 93;

Anthony v. Railway Co., 132 U. S. 173;

Shelp v. United States, 81 Fed. 700;

Mobile & Montgomery R. Co. v. Jurey, 111
U. S. 584.

McCendon vs. U. S. 229 Fed. 523.

In fact, as was said by this court, in the case of Western Union Tel Co. v. Baker, 85 Fed. 690, in an opinion by Circuit Judge Gilbert, passing upon the same matter:

"That position is sustained, we believe, by every court to which the question has been presented," citing numerous cases.

It is therefore respectfully submitted that for the

reasons above stated this court is precluded from considering the first assignment of error of plaintiffs in error.

There was, however, no error in the instruction complained of, and if this court should feel that it should examine into that question, we submit herewith points and authorities in support of the instruction as given to the jury by the trial court.

It is very apparent from the statement of facts as set forth in the brief of plaintiffs in error that counsel for plaintiffs in error have diligently endeavored to present a statement of facts which would fall within the purview of the rule as laid down in the case of *Woo Wai vs. United States*, 223 Fed. 412. So intently were counsel bent upon this task that they no doubt inadvertently overlooked some of the testimony which we present here in the nature of a correction and addition to the statement of facts as presented by the brief of plaintiffs in error.

On May 8, 1911, United States Immigration Inspector Morse met the defendant, Sam Yick, at Bakersfield, California, and had a conversation with him. During the course of that conversation, the defendant Sam Yick stated to the inspector, Morse, that if the inspector desired to make a good deal of money, the inspector could prepare papers for some Chinese that were in Mexico, so as to enable them to get to Bakersfield and that he, Sam Yick, would be able to give the inspector a good deal of business in that line. The inspector asked the defendant, Sam Yick, where the Chinese would come from and Sam Yick answered that he had friends in

Juarez, Mexico, that wanted to come to Bakersfield, and that he, Sam Yick, had letters from them in reference to coming to Bakersfield, and he wanted the inspector to prepare papers purporting to show that these Chinese in Mexico were native born citizens of the United States so that they would be enabled to pass the immigration inspectors on the way to Bakersfield (Tr. p. 46). Sam Yick further said that it would be easier to get the Chinese into the United States from Ensenada, Mexico, than from Juarez, and that if it looked good to the inspector, they could bring in a good many Chinese from Ensenada; that he knew of several Chinese that would come, and that he would pay \$250 to the inspector for each Chinese so brought (Tr. p. 47).

Sam Yick also told Inspector Morse after the Chinese were arrested in San Diego that he had gotten two letters from Ensenada from Chinese that were anxious to come over, and that the Chinese in Ensenada had written that they did not have the money to put up themselves, but they had written him the names of some Chinese firms both in San Francisco and Fresno who would guarantee the money to Sam Yick (Tr. p. 69).

Inspector Morse testified (Tr. p. 83) that it was not a fact that from the very first conversation that he had with Sam Yick, he encouraged Sam Yick to pursue the proposition of bringing contraband Chinese into the country, and he further testified that he did not aid Sam Yick or Jung Kim in any way with a view of getting him to continue in developing the proposed course of bringing Chinese

into the country, and he further testified that whatever he did in the matter was done for the purpose of securing evidence of the fact that Sam Yick had, prior to that time, been engaged in the smuggling of Chinese (Tr. p. 83). He further testified (Tr. p. 87), that he was instructed by his superior officer not to take the initiative in any instance. He further testified (Tr. p. 88) that it was the defendant Sam Yick who suggested that the defendant Jung Kim act as a guide to bring the Chinese from Mexico.

It will also be noted from the transcript that this testimony of Inspector Morse is uncontradicted and undenied. It will also be noted from the transcript (pages 208 and 211) that although both defendants took the stand in their own behalf, there was absolutely no denial on the part of either one of them that the criminal intention to commit the offense had its origin in the mind of the defendant Sam Yick. *Diggs vs. U. S.*, 220 Fed. 545. And Jung Kim actually did bring the Chinese into the United States as testified to by Edward P. Morse (Tr. p. 68).

At least three of the letters found in the possession of the defendant Sam Yick and introduced in evidence, to-wit, U. S. Exhibit 12J (Tr. p. 174), U. S. Exhibit 12L (Tr. p. 117), U. S. Exhibit 12K (Tr. p. 179), were written prior to the 8th day of May, 1911, the date on which Inspector Morse had his first conversation with Sam Yick, wherein the matter of smuggling Chinese was mentioned. A reading of these letters shows beyond peradventure of a doubt that the defendant Sam Yick was engaged

in the business of advancing letters of guarantee in order that Chinese in Mexico not lawfully entitled to enter the United States might be surreptitiously brought into the United States in violation of the immigration laws.

Therefore, upon these facts, it is respectfully submitted that the case at bar is easily distinguishable from the case of *Woo Wai vs. United States*, so strongly relied upon by plaintiffs in error. In the *Woo Wai* case, 223 Fed., reading from page 414, this court said:

“The general rule in regard to entrapment is expressed in 12 Cyc. 160: ‘The fact that a detective or other person suspected that the defendant was about to commit a crime and prepared for his detection as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design.’ In the case at bar, there is *no evidence* that prior to the time when the defendant first approached *Woo Wai*, any of the defendants had ever been engaged in the unlawful importation of Chinese, or had ever committed or thought of committing any offense against the immigration laws. The purpose for which the detective was employed and the object of the scheme of entrapment, was not to punish men who were suspected of crime; but the whole purpose was to place *Woo Wai* in a position where he might be compelled to disclose facts of which he was suspected to have knowledge, knowledge not shown to be derived from unlawful acts of his own, but which related only to the unlawful acts of

other persons— —”

This court, in the same opinion, page 415, further said:

“Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so of the decision in *People v. Mills*, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131. *But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant. Thus in People v. Mills, it was the defendant who made the first suggestion looking toward the commission of the criminal act, and for the commission of that act the district attorney furnished him opportunity and lent him aid. In the case at bar, the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them.*”

As heretofore said, the evidence in this case being uncontradicted and undenied, that the first suggestion looking toward the commission of the criminal act came from the defendant Sam Yick, it will easily and readily be seen that this case falls within the doctrine laid down in the case of *People vs. Mills*, supra, and is distinguished from the *Woo Wai* case in the same manner that this court distinguished the *Woo Wai* case from the case of *People vs. Mills*.

The transcript fails to disclose any evidence to

the effect that the government officers incited or first suggested the commission of the offense, but, on the contrary, the transcript discloses that all of the evidence was to the opposite effect. We respectfully submit that under those circumstances, the instruction of the trial court was correct, and whatever participation the government officers took in the commission of the offense, the evidence discloses, was done solely for the purpose, as in the case of *People vs. Mills*, of securing evidence of a criminal intention that had its origin in the mind of the defendant.

In the case of *People vs. Liphart*, 105 Mich. 80, the court said:

“We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. In cases of alleged larceny, where the master has directed a servant to deliver his property to a thief, or burglary, where he has directed the admission of the burglar, the principal element of the offense is lacking; in the former there is no felonious taking, in the latter no felonious breaking and entering.”

Also, in the case of *State vs. Waghalter*, 177 Mo. 676, the court said:

“While generally private persons cannot license crimes, and it is no palliation or excuse that a wrongdoer has anybody’s permission, there are exceptions to this general rule, be-

cause there are certain acts which the law makes criminal when and because done without consent, the doing of which with consent is not legally reprehensible.”

To the same effect are the following cases:

“We cannot agree with the reasoning of the Colorado court. It would be applicable to the commission of that class of crimes in which the want of consent of the owner of property to its taking or destruction was a necessary element of the offense. In such cases the owner of the property taken or destroyed might, by his conduct in employing a detective to entrap a person suspected of crime, destroy the element of want of consent to such taking or destruction of his property, and hence no crime would be committed by such taking or destruction. But can a man consent to an assault upon himself, and thereby free the perpetrator of such an assault from legal responsibility? Can an officer consent to the commission of a crime and by so doing free the act of its criminal character? A private individual may be estopped in matters relating to his property by his own conduct. Is anyone else estopped by his conduct unless such other person is privy thereto? Has a public officer such property rights in his office and in the enforcement of the law as by his conduct or consent to be able to estop the state in a prosecution of crime? If so, whose liberty, property, character, or life would be safe? There can be but one answer to these questions, and that is emphatically ‘No.’ The statement of these propositions amounts to their demonstration, and we deem it unnecessary to

make any further argument or to cite authorities in support of our position, at least not until some reason is shown for a contrary view.”

DeGraff v. State, 2 Okla. Cr. 519, 103 Pac. 538, 550. (On motion to strike out testimony of detective inducing sale intoxicating liquors contrary to law.)

* * * “The law alleged to have been violated was enacted for the benefit and protection of all the people, for the promotion and preservation of their health, sobriety, thrift, peace, and safety. It was not enacted in the special interest of the prosecuting officers, and a violation thereof is an offense, not against the prosecuting attorney, but against the state. Prosecutions for offenses of this character are in the interest of the public solely, and the prosecuting officer can neither repeal the law, pardon the offender, nor grant indulgences; nor can he lawfully give immunity except in those instances provided for by law. It is no less an offense to sell intoxicating liquor for any purpose to a sheriff or prosecuting attorney or to an agent or representative of either, than it is to sell to any one else; and a sale made to such officer or his agent, though solicited by him for the purpose of detecting the commission of the offense and of instituting a prosecution therefor, is punishable, and the officer’s solicitation works no estoppel to a prosecution. The pith of the matter was well stated by Justice Vann in *People v. Mills*, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131, when he said: ‘We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his pow-

ers and held out a bait. The courts do not look to see who held out the bait, but to see who took it.'

"We are aware that there are some decisions which apparently uphold the doctrine contended for by plaintiff in error; but the overwhelming weight of authority, and in our opinion all the reasoning, is on the other side, especially in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnished evidence of a course of conduct. See *Onondaga County Com'rs v. Backus*, 29 How. Prac. (N. Y.) 33; *Tripp v. Flanigan*, 10 R. I. 128; *People v. Murphy*, 93 Mich. 41, 52 N. W. 1042; *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *People v. Everts*, 112 Mich. 194, 70 N. W. 430; *People v. Rush*, 113 Mich. 539, 71 N. W. 863; *City of Evanston v. Myers*, 172 Ill. 266, 50 N. E. 204; *State v. Jansen*, 22 Kan. 498; *State v. Stickney*, 53 Kan. 308; 36 Pac. 714, 42 Am. St. Rep. 284; *People v. Mills*, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; *United States v. Whittier*, 5 Dill. 35, Fed. Cas. No. 16 688; *Bates v. United States (C. C.)*, 10 Fed. 92, and note; *United States v. Moore (D. C.)*, 19 Fed. 39; *United States v. Dorsey (D. C.)*, 40 Fed. 752; *Shepard v. United States*, 160 Fed. 584, 87 C. C. A. 486; *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; *Goode v. United States*, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297; *Andrews v. United States*, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; *Price v. United States*, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727. In many instances habitual and flagrant violations of the

liquor laws can be detected by no other means. The officer or his agent may furnish the defendant in such cases the opportunity to sell, but he does not furnish the defendant the liquor or the intent to sell; and the sale to an officer is not more meritorious or less criminal than if made to some other person. We find nothing in the law or in public policy forbidding the detection of both the offense and the offender in this manner, and we have no criticism to expend upon a public officer who may find it necessary or expedient to adopt this means of discovering infractions of this law."

Moss v. State, 4 Okla. Cr. 247, 111 Pac. 950, 952.

"In *People v. Everts*, 112 Mich. 194, and *People v. Rush*, 113 id. 539, it was held no defense in an indictment for an unlawful sale of liquor that it was made to a detective sent by a prosecuting attorney that he might use such purchase and sale as evidence. Indeed, the authorities are numerous, and it would cripple the effective enforcement of the criminal law if it were not permissible to thus procure evidence.

"There are some seeming exceptions, for instance, in larceny, whenever the conduct of the owner amounts to a consent that his property may be taken. The reason is that in larceny it is an indispensable element of the offense that the property shall be taken 'against the will of the owner.' Also, in proceedings for divorce, if the plaintiff secures some one to entice the defendant into illicit acts. The reason is that 'connivance is always a bar to the plaintiff's

cause of action.' *Dennis v. Dennis*, 57 Am. St. 95. But as to prosecution for offenses, not against individuals, but against the public, like the present, it is no defense that the illegal sale was made to a party who bought not for his own use, but to aid in convicting the seller. It is not the motive of the buyer, but the conduct of the seller, which is to be considered."

State v. Smith, 152 N. C. 798, 799, 800.

"The methods adopted by the policeman to catch the defendant in the act of violating the law have been criticised; but it must be remembered that the ways of 'blockaders' are devious and their trade is generally plied 'underground.' However much the defendant, when caught, may criticise the methods used to catch him, it has been held that the transaction is, so far as the defendant is concerned, a violation of law, if the evidence is deemed by the jury sufficient proof of the facts."

State v. Hopkins, 154 N. C. 622, 624.

"It further appears from the evidence that the prosecuting attorney of Butler county was informed of this arrangement and made no objection thereto. Appellant contends that on this showing the court should have *pro bono publico* dismissed the cases.

"Whatever may be said derogatory to the character of those who, as detectives, spies and informers, entrap the law-breaking class by gaining their confidence and practicing deceit upon them, it has never been ruled that they were incompetent witnesses nor that they might

not tell the truth, nor is there any recognized public policy that condemns their occupation. On the contrary, the keen and shrewd detective is one of the greatest safeguards to urban life and a terror to the thugs and thieves that infest the cities of the country.

“* * * To discover and bring to justice those who subtly, clandestinely and illegally dispense liquors, the methods resorted to in this case are sometimes indispensable, and when nothing more than the truth is elicited and the guilty are brought to justice through their efforts, a valuable service to the community will have been rendered.”

State v. Lucas, 94 Mo. App. 117, 121.

“Considerable legal hair-splitting has been indulged in by courts and text writers in discussing this subject. It must be admitted at the outset that it is beyond the power of a private person to license the commission of a crime. As to these more serious crimes which are purely transgressions of the public right, it must follow that consent thereto of private persons directly injured thereby cannot, to any extent, purge such crimes of their character as public wrongs, nor render those who committed them less liable to punishment. The consent of a woman upon whom an abortion was performed constitutes no defense to a prosecution therefor. Commonwealth v. Wood, 77 Mass. (11 Gray) 85; Commonwealth v. Snow, 116 Mass. 47. Similarly, consent of the deceased is no defense to a prosecution for homicide. Regina v. Allison, 8 Car. & P. 418. In a prose-

cution for bribery, the fact that the prosecuting witness was the giver of the bribe in question cannot excuse defendant. *Newman v. People*, 23 Colo. 300, 47 Pac. 278. Nor is the latter exculpated by proof that the bribery was instigated for the purpose of entrapping him. *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *State v. Dodoussat*, 47 La. Ann. 977, 17 South. 685.

“The offer to bribe a public official is a transgression of a public right, and the consent or nonconsent of the officer cannot affect the criminality of the act of the person who makes the offer, and even though Mr. Wilson by his words, acts and conduct may have been the inducing cause of the offer to bribe, yet, if appellant did, in fact, tender money to the officer with the intention and for the purpose of influencing his action as such officer, he would be guilty under our statute. It would not be an offense against Mr. Wilson so much as an offense against the public welfare, and one which no officer would have the authority nor power to give his consent to.”

Also, the Supreme Court of the United States, in the case of *Grimm v. United States*, 156 U. S. 604, in sustaining the doctrine as laid down in the above cases, said, in part:

“It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. * * * The official, suspecting that the defendant was engaged in a

business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States. * * *

See also:

Commonwealth v. Wasson, 42 Pa. Sup. Ct. 38;

People v. Conrad, 92 N. Y. Supl. 606;

U. S. v. Morgan, 181 Fed. 587;

State v. Abley, 109 Iowa 61, 46 L. R. A. 862;

O'Halloran v. State, 31 Ga. 206;

Counsel state in their brief that no Chinamen were ever brought over, but this is not in accordance with the transcript, as on page 136 of the transcript will be found the testimony of J. K. Wilson, who testified that he was Chief of Police of San Diego, and arrested three Chinamen, each of whom had a slip of paper corresponding to the slips of paper prepared by the defendant, Sam Yick, and introduced in evidence in the Government's case (Tr. pp. 64, 65), and, of course, in that connection it will be remembered that the indictment under which the defendants were convicted is a conspiracy indictment, and that it is immaterial, in a conspiracy case, whether or not the object of the conspiracy was successful.

However, in this connection it is well to call the Court's attention to the fact that Jung Kim told Morse (Tr. p. 58) that he had been to Tia Juana and got the Chinese, but that as he was coming up along the railroad track at night the Chinese got frightened and ran away and he had lost them; and this is also

verified by Mr. Bernard's testimony (Tr. p. 108 *et seq*).

The facts as recited in the transcript and as heretofore stated, clearly show that this case is distinguishable in that regard from the case of *Woo Wai vs. United States*, for in the case of *Woo Wai vs. United States* the facts as testified to by the defendant fell short of showing that there was in fact a conspiracy to commit a criminal act within the meaning of Section 5440, and that for the reason that the criminal intention to commit the offense had its origin in the minds of the Government officers, in the *Woo Wai* case, but in this case it had its origin in the minds of the defendants.

SECOND ASSIGNMENT OF ERROR

The second assignment of error relates to the introduction in evidence by the Government of nine letters taken from the store of the defendant Sam Yick in Bakersfield by the sheriff of Kern County under a writ of attachment and subsequently turned over by the sheriff to Charles E. Kruse, the trustee in the case of *In re. Sam Yick, Bankruptcy* (Tr. p. 148).

There never was any application made for the return of these letters until on the trial of the case, when the witness Kruse was upon the stand and the letters were offered by the Government, at which time counsel for defendant made a demand for the return of the letters (Tr. p. 150). This application was refused by the trial judge on the ground that the application came too late. In this there was no error, as the case of *United States vs. Weeks*, 232 U. S. 383,

decided by the Supreme Court of the United States on the 24th of February, 1914, settles the law to be that the trial court in the trial of a criminal case will not stop to consider the manner in which papers have come into the possession of the witnesses, and that in order to secure the return of papers unlawfully seized and taken from a defendant, the defendant must make a seasonable application prior to the trial of the case, for their return. In relying upon the Weeks case, counsel for defendant evidently overlooks the fact that the Weeks case was based upon an application seasonably made; that is, made prior to the time of the trial, for the return of the papers there involved, and if counsel had carefully read the case he would have found that the Supreme Court directly held that in order to be considered, the application must be made prior to the time of the trial.

The Supreme Court said, in the Weeks case, in part, quoting from pages 395 and 396 of the opinion:

“ . . . It was further held, approving in that respect the doctrine laid down in 1 Greenleaf Sec. 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the courts in the course of a trial would not make an issue to determine that question, and many state cases were cited supporting that doctrine.

“The same point had been ruled in *People v. Adams*, 176 N. Y. 351, from which decision the case was brought to this court, where it was held that if the papers seized in addition to the policy slips were competent evidence in the case, as the court held

they were, they were admissable in evidence at the trial, the court saying (p. 358) : 'The underlying principle obviously is that the court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have passed themselves of papers, or other articles of personal property, which are material and properly offered in evidence.' This doctrine thus laid down by the New York Court of Appeals and approved by this court, that a court will not, in trying a criminal cause, permit a collateral issue to be raised as to the source of competent testimony, has the sanction of so many state cases that it would be impracticable to cite or refer to them in detail. Many of them are collected in the note to *State v. Turner*, 136 Am. St. Rep. 129, 135 *et seq.* After citing numerous cases the editor says: 'The underlying principle of all these decisions obviously is, that the court, when engaged in the trial of a criminal action, will not take notice of the manner in which a witness has possessed himself of papers or other chattels, subjects of evidence, which are material and properly offered in evidence: *People v. Adams*, 176 N. Y. 351, 98 Am. St. Rep. 675, 68 N. E. 636, 63 L. R. A. 406. Such an investigation is not involved necessarily in the litigation in chief, and to pursue it would be to halt in the orderly progress of a cause, and consider incidentally a question which has happened to cross the path of such litigation, and which is wholly independent thereof.' "

This effectively disposes of the second assignment of error, but it might be said in passing that the application for the return of the papers, if it had been seasonably made, would have been denied by the court for the reason that the papers were not seized by Government officers, but were taken by the sheriff in the exercise of a lawful proceeding. The Supreme Court, in the Weeks case, in the last paragraph of that opinion, among other things, says:

“ . . . As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures. The record shows that what they did by way of a arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies. *Boyd Case*, 116 U. S. 616, and see *Twining v. New Jersey*, 211 U. S. 78.”

THIRD ASSIGNMENT OF ERROR

The third assignment of error relates to the same letters involved in the second assignment of error, but is based upon different grounds. This assignment alleges as error the admission of the letters in evidence on the ground that the letters were incompe-

tent, because no connection was shown between the letters and the defendant. It will be remembered that Inspector Morse testified that Sam Yick told him that there were a number of Chinese in Mexico who wanted to come to the United States, and that he, Sam Yick, had letters from these Chinese in Mexico in reference to coming to the United States, and Sam Yick wanted to know if Inspector Morse couldn't prepare papers purporting to show that these Chinese in Mexico were native-born citizens of the United States (Tr. p. 46). This was on May 8, 1911, and was the first mention of Chinese smuggling between the defendant Sam Yick and any of the Government officers. The letters, which are set out in the transcript on pages 174, 177, 179, 182, 184, 185, 187, 188 and 191, show that they deal with matters involved in the indictment, and they were found in the possession of the defendant and, as will hereafter appear, were directed to him. The transcript further shows that the main objection made by defendants' counsel was the fact that the letters were presumably directed to one Jock Coy and that there was no connection shown between Jock Coy and the defendant Sam Yick. It is evident that counsel has failed to carefully read all of the letters or he would find that the letters themselves show that although directed to Jock Coy, they were meant for Sam Yick.

The first letter, in point of time, being U. S. Exhibit 12 L, appears on page 177 of the transcript. It is directed to "Brother Jock Coy" and asks Jock Coy to write a letter of guarantee at once for the writer (Jock Toh, or Deang Jock Toh) in order that the

said writer might be enabled to be smuggled into the United States. The letter further refers to the fact that one "Sam Lin is an experienced man and has been in the smuggling business for the past thirty years."

The second letter in point of time appears on page 174 of the transcript, being U. S. Exhibit 12 J. It is dated April 13, 1911, and is directed to Mr. Deang Coy, and is signed by Quan Ching Lim, and recites the fact that the writer has received a letter from a Chinaman of Ensenada, stating that a countryman desires to come to the United States and that the countryman's name is Deang Jock Toh. The letter also states that the Chinaman Deang Jock Toh has informed the writer that Deang Coy, the addressee, is willing to issue a letter of guarantee for Deang Jock Toh's expenses. This letter, U. S. Exhibit 12 J, is directed to Sam Yick Company. Counsel makes a point of the fact that the transcript would indicate that it was directed to Sam Yick Company, Riverside, but it will be noted that the writer asks Deang Coy, the addressee, to address his reply to P. O. Box 1195, Riverside Calif., and it will therefore easily be seen that Riverside was simply the place where the letter was written, and the letter was really intended for Sam Yick Company, and, as heretofore recited, and admitted by defendant, was found in Sam Yick's possession at Bakersfield.

The third letter in point of time is U. S. Exhibit 12 K, found on page 179 of the transcript. It is also signed Deang Jock Toh, dated April 14, 1911, directed to "Brother Jock Coy," and refers to the fact

that the writer has heard that the immigration officers will make a strict inspection for certificates and asks the addressee, Jock Coy, to be sure and send to the writer the letter of guarantee, evidently referring to the writer of April 7, heretofore quoted.

The next letter in point of time, U. S. Exhibit 12 I, found on page 182 of the transcript, is addressed on the envelope to Deang Jock Coy and refers to smuggling of Chinese.

The next letter in point of time is U. S. Exhibit 12 D, appearing on page 184 of the transcript, dated during the early part of June, 1911, directed to Jock Gim and Jock Coy, asking Jock Gim and Jock Coy to endeavor to get certain other Chinese into the United States.

The next letter in point of time is U. S. Exhibit 12 H, appearing on page 185 and page 186 of the transcript, being another letter from Deang Jock Toh, dated June 13, 1911, and directed to Jock Coy, which further refers to the smuggling of Chinese.

The next letter in point of time is U. S. Exhibit 12 M, appearing on page 187 of the transcript, dated September 2, 1911, being also a letter from Deang Jock Toh to Jock Coy, referring to the smuggling of Chinese; and it so happened that the envelope in which this letter was sent was found with the letter and the address on the envelope was as follows: "Deliver this to Sam Yick Company of Bakersfield" (Tr. p. 188). This letter and envelope show, beyond a doubt, that the name Jock Coy was simply one of many Chinese names under which the defendant Sam Yick went, and shows the Government's contention

that all the letters directed to Jock Coy were intended for Sam Yick, to be correct, and that is the reason they were found in the defendant's, Sam Yick's, possession.

It also clearly appears from the evidence that the box containing the letters was the personal property of Sam Yick, and that he was cognizant of the contents thereof, inasmuch as the receipt which E. P. Morse gave Sam Yick for the \$60 advanced was found in the box (Tr. pp. 148, 149).

This is also true of the next letter, U. S. Exhibit 12 A, appearing on page 188 and page 189 of the transcript, from the same Deang Jock Toh, directed to Jock Coy, also referring to the smuggling business, the address on the envelope being as follows: "Sam Yick Kim Kee Co., Phone Main 113, No. P. O. Box 363, 723 18th Street, Bakersfield, Cal." (Tr. p. 190).

And the last letter, U. S. Exhibit 12 G, appearing on page 191 of the transcript, is also directed to Jock Coy, and refers to the Chinaman Jock Toh and also to the Chinese Ah Sing, Dock Yoke and Shi Jew, the last three being (with some slight variation in spelling) the same Chinese that were brought into the United States in furtherance of the conspiracy. (See Tr. pp. 64, 65.)

It will thus be seen that all the letters related to the smuggling of the Chinese from Mexico into the United States, which was the object of the conspiracy as charged in the indictment. It will further be seen that at least three of the letters were dated in April, 1911, which was prior to the first conversation the de-

fendant Sam Yick had with any Government official about smuggling Chinese, which was on May 8, 1911.

It will further be seen, from an inspection of the letters themselves, that while the body of the letter commences with the words "Brother Jock Coy" or "Deang Coy," they were directed, in many instances, to Sam Yick Company, thus establishing the fact that Jock Coy is a family name or nickname of some kind for Sam Yick, and when it is remembered, as heretofore stated, and as appears from the transcript, pages 148 *et seq.*, that these letters were found in the possession of the defendant Sam Yick, it will be seen that the ruling of the trial court in holding that the connection between the letters and the defendant was sufficient to justify their admission, was correct. They are material, of course, not only upon the ground upon which they were admitted by the trial court, that is, that they corroborated the Government Inspector's, Morse's, testimony to the effect that Sam Yick told him on May 8, 1911 (Tr. p. 46), that he had certain letters from Chinese friends who wanted to come to this country from Mexico, but also for the purpose of showing that Sim Yick was engaged in the business of smuggling Chinese prior to the first conversation he ever had with a Government officer on the subject, which was on May 8, 1911; and the objection on the ground of hearsay is answered by the same statement which the defendant Sam Yick made to the inspector, Morse, to the effect that he had letters from friends in Mexico who wanted to come to this country (Tr. p. 46). It will, of course, be borne in mind that the testimony on all of these

matters is uncontradicted and undenied.

In so far as the defendant Jung Kim is concerned, the verdict of the jury shows that the connection of the defendant Jung Kim with the conspiracy at the time of the commission of the overt acts, therein set out, to-wit, on the 8th and 13th days of September, 1911, was established beyond a reasonable doubt, and all of these letters are of dates prior to those dates, and it is, of course, a matter of law so well settled as to not need the citation of authorities, that one conspirator is responsible for everything said or done by another conspirator in furtherance of the object of the conspiracy, while he is still a member of the conspiracy, and for all things said or done by any of the members of the conspiracy in furtherance of the object of the conspiracy prior to the time that he became a party to the conspiracy.

Any party coming into a conspiracy at any state of the proceedings, with knowledge, is regarded as a party to all acts done by any of the other parties before or afterwards, in furtherance of the common design.

United States v. Cassidy, 67 Fed. 698;

United States v. Sacia, 2 Fed. 754;

Thomas v. United States, 156 Fed. 898;

Crawford v. United States, 212 U. S. 183;

Clune v. United States, 159 U. S. 590.

These being the only three errors assigned, and relied upon by counsel for the Plaintiffs in Error, we respectfully submit that the judgment of the trial

court should be affirmed.

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